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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1642

ARTHUR J. ABRAMS,

Petitioner,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner Arthur J. Abrams respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of California in the case at bench, and that upon such review said decision be reversed.

This petition presents for review one of the most cruel and unjust constitutional

anomalies extant in the country today: The plight of a small, one-location businessman who finds himself in the path of the urban redevelopment bulldozer, only to discover in the process that his constitutional promise of "just compensation" is an illusion compounded of archaic 19th Century rhetoric that bears no more relation to the reality of mass condemnations in today's urban society, than a horse-drawn wagon does to modern transportation systems.

Mr. Abrams, the petitioner, is an elderly unemployable druggist whose established, 27-year old business and its valuable stock of prescription medicines were effectively confiscated in the process of condemnation of his drugstore for the Watts Redevelopment Project. He prays for relief from this Court; relief which was partially granted by the trial court below, fully granted by the California Court of Appeal, and then denied altogether by the California Supreme Court.

Opinions Below

The opinion of the California Supreme Court presented for review by this petition is reported as Community Redevelopment Agency v. Abrams (1975) 15 Cal.3d 813, 126 Cal.Rptr. 473, 543 P.2d 905. The vacated intermediate appellate opinion is Community Redevelopment Agency v. Abrams (1974, Cal.App.) 116 Cal.Rptr. 308. Copies of the opinions are attached hereto as Appendices.

Jurisdiction

The opinion of the California Supreme Court was filed on December 29, 1975. Thereafter that court (by its order filed January 23, 1976) extended time for granting or denying rehearing until February 27, 1976; and eventually denied petitioner's timely petition for rehearing on February 11, 1976.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented for Review

1. Is it permissible under the due process and equal protection clauses of the 14th Amendment to the United States Constitution for a state to declare: (a) by its constitution, (b) by its statutes, and (c) by its decisional law that business goodwill is property - taxed as such and treated as such for <u>every</u> purpose and in <u>all</u> legal contexts, but deny compensation when such business goodwill is taken and destroyed by that state's exercise of the power of eminent domain?

2. Is it permissible under the due process and equal protection clauses of the 14th Amendment to the United States Constitution for a state to declare business goodwill to be property in the state constitutional sense for purposes of taxation, but not property in the constitutional sense for purposes of eminent domain?

3. (a) Where state law (i) requires a druggist to maintain an adequate stock of prescription medicines, and (ii) forbids the bulk disposition of such medicines (except upon a laboratory certification the cost of which exceeds the value of

the medicines), is it a deprivation of property without due process of law for the state to deny compensation for the value of such medicines when the drugstore housing them is taken under eminent domain for an urban redevelopment project and the stock of such medicines cannot be sold because the cost of certification exceeds its value?

(b) Where the value of such medicines is stipulated to be $10,000, and they consist largely of high-potency tranquilizers of relatively small weight and bulk, which makes them easily and cheaply transportable, (i) is it a deprivation of property without due process of law for a state statute to limit compensation for the taking of such medicines to the cost of moving them, and (ii) is it a denial of equal protection to so limit such compensation, in that owners of bulky and heavy commodities that cost more to move, arbitrarily receive higher compensation, irrespective of the value of the commodity or the loss suffered by its owner?

Constitutional and Statutory Provisions

The following constitutional and statutory provisions are involved in this Petition. Each is reproduced in full in the Appendix attached hereto:

U.S. Constitution, Fifth and Fourteenth Amendment;

California Constitution, Art. 1, §19;

Art. 13, §§1, 2:

Cal. Civ. Code §§ 654, 655;

Cal. Bus. & Prof. Code §14102;

Cal. Govt. Code §§ 7262, 7267.

STATEMENT OF THE CASE

The facts at bench are the subject of findings made by the trial court on ample and uncontradicted evidence.

Before the instant case, Petitioner, Arthur J. Abrams was the owner of the subject property which was taken by the Redevelopment Agency. Mr. Abrams was at the time of trial 64 years old, and had been a druggist for 43 years. For 27 years preceding the instant case Mr. Abrams had been the owner of and operated a drugstore on the subject property.

Beginning five years before the instant case, Mr. Abrams has suffered from

rheumatoid arthritis which increasingly prevented him from physical activity or from standing for periods of more than an hour. By reason of his age and physical condition, Mr. Abrams is unemployable, and must rely for a livelihood on his own business, and for that reason his business - until it was taken - constituted his only source of livelihood, and his principal asset.

By reason of his age and physical condition, Mr. Abrams is incapable of starting a new business located in a new area, because the effort involved in such an endeavor would tax him beyond his physical capacity and is economically unwise because of his age and health. Nor can he reopen his business in its old area and keep his established customers because the condemnor took some 20 square blocks in the area surrounding Mr. Abrams' property, thereby scattering the inhabitants from whom Mr. Abrams drew his clientele. These factors combined to make it impossible for Mr. Abrams to reopen his business.

Mr. Abrams' business, Sav-Way Drugs, was, before the taking, an ongoing business

conducted on the subject property. One of the business assets of Mr. Abrams' business was its valuable goodwill owned by Mr. Abrams.

The trial court expressly found that Mr. Abrams' goodwill was "taken, damaged and destroyed" by the Redevelopment Project.

Moreover, Mr. Abrams' drugstore sold - in addition to other merchandise - prescription drugs. His pharmacy was the only one in the area to stock the extremely potent tranquilizers and similar drugs prescribed by mental hospitals to their outpatients. These drugs are expensive and hence a stock of them quickly mounts up into substantial sums (the value of these prescription drugs in open containers, i.e., bulk containers that had been opened to dispense part of their contents for individual prescriptions, was stipulated to be $10,000).

Under California law drugs in open bulk containers may not be re-sold for off-premise removal except to another licensed druggist, and then only upon a laboratory certification that the drugs are pure and

wholesome. However, in the case at bench, the problem was that the cost of such a certification would exceed the drugs' stipulated $10,000 value. On that basis, Mr. Abrams contended at trial that his drugs' value was completely destroyed thereby constituting a taking within the meaning of the Constitution.

The trial court ruled the drugs' value to be compensable, but denied compensation for Mr. Abrams taken business goodwill.

The California Court of Appeal affirmed as to the compensability of the drugs, and reversed as to compensability of business goodwill (116 Cal.Rptr. 208).

The California Supreme Court reversed as to the compensability of the drugs and affirmed as to compensability of business goodwill, thereby denying Mr. Abrams any relief.1/

1/ Under California practice, the granting of hearing by the Supreme Court automatically vacates the intermediate Court of Appeal opinion and transfers the appeal de novo to the Supreme Court. Thus, the State Supreme Court's reversal and affirmance refer to the trial court's judgment.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In 1954 this Court in Berman v. Parker (1954) 348 U.S. 26, issued a broad and well-nigh unreviewable authority for urban redevelopment agencies to take private property. This awesome power was conditioned on payment of "just compensation" (348 U.S. at 36). Yet in the almost quarter-century that followed, this Court has not considered a single case dealing with the parameters of "just compensation" applicable to the mass urban condemnations that have swept the county under the imprimatur of Berman.[2/]

While the stresses that the era of redevlopment was certain to impose on the

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2/ Indeed, cold statistical data inexorably suggest that the most recent decades have seen a precipitous decline in the numbers of eminent domain matters considered by this Court (see data collected in 48 Notre Dame Lawyer at 804, fn. 196), even though eminent domain litigation has mushroomed throughout the country giving rise to hosts of difficult and widely acknowledged constitutional questions.

then-extant, candidly 19th Century criteria of "just compensation" were noted and assessed early,[3/] actual experience surpassed the apprehensions of the early critics. Undisputed data developed before the Congress [4/] and other governmental agencies [5/] have disclosed that all too often the mid-20th Century "just compensation" proved in reality neither just nor - in many cases - any compensation.

3/ See e.g., the brilliant analysis contained in the now-classic Comment, Eminent Domain Valuations in an Age of Redevelopment, 67 Yale L.J. 61 (1957), which astutely traced the anomalous development of American rules of compensability and ably spotlighted their inadequacy in the coming tidal wave of urban redevelopment expropriations.

4/ See Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, House Committee on Public Works, 88th Congress, 2d Session, Committee Print No. 31 (Dec. 27, 1964).

5/ See Relocation: Unequal Treatment of People and Businesses Displaced by Government, Advisory Commission on Intergovernmental Relations (Jan. 1965).

The space limitations inherent in this petition preclude one from exploring this topic fully. Suffice it to note that probably no other area of the constitutional law has come in for as consistently withering an appraisal by the scholarly community as has the treatment of business losses in eminent domain. See passim Aloi and Goldberg, A Reexamination of Value, Good Will and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968); Comment, Non-Compensable Business Losses in Eminent Domain Proceedings: A Time for Re-evaluation, 46 Temple L.Q. 72 (1972); Note, "Just Compensation" for the Small Businessman, 2 Columbia Jour. of Law & Soc. Prob. 144 (1966); Note, The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases, 20 Hastings L. Jour. 675 (1968). Also see, Bigham, "Fair Market Value","Just Compensation" and The Constitution: A Critical View, 24 Vanderbilt L. Rev. 63 (1970), Comment, supra, 67 Yale L. J. 62; Michelman, Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Spies & McCoid, Recovery of Consequential

Damages in Eminent Domain, 48 Va. L. Rev. 437 (1962).

In sum, this is a long-neglected area of constitutional law that cries out for examination by this Court in light of today's conditions. As this Court has told us time and again, the constitutional "just compensation" command embodies principles of "fairness and equity" 6/ and that "basic equitable principles of fairness" are to be invoked to temper technical concepts of property law.7/ If ever a case was presented for review that deserves the invocation of these policy principles, this is it. Relief by this Court is urgently called for.

6/ United States v. Virginia E. & P. Co. (1961) 365 U.S. 624, 631; United States v. Commodities Trading Corp. (1950) 339 U.S. 121, 124.

7/ United States v. Fuller (1973) 409 U.S. 488, 490.

ARGUMENT

1.

A STATE MAY PROPERLY CHOOSE FOR ITSELF WHAT ECONOMIC INTERESTS CONSTITUTE "PROPERTY" RIGHTS UNDER ITS JURISPRUDENCE, BUT HAVING THUS MADE ITS CHOICE AND DEFINED "PROPERTY", IT IS BOUND TO EXTEND CONSTITUTIONAL PROTECTION TO SUCH PROPERTY RIGHTS AND MAY NOT SUBJECT THEM TO CONFISCATION WITHOUT OFFENDING DUE PROCESS AND EQUAL PROTECTION GUARANTEES

As this Court put in in United States v. Willow River Power Co. (1945) 324 U.S. 499, 503:

> ". . . whether it is a property right is really the question to be answered."

And that answer is provided, not by some unguided judicial discretion as to whether to compensate for the taking of a private economic interest, but by criteria established by reasoned principles of constitutional law that is applied in delineating the extent of judicial protection extended to such interest.[8/] Willow

8/ Thus, in Kimball Laundry Co. v. United States (1949) 338 U.S. 1, 5-6, (Continued)

River covers this point quite explicitly:

> ". . .only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . ."
> 324 U.S. at 502.

In other words, it is the fact that state law extends its protection to a given economic right that confers upon that right the status of "property" in a constitutional sense. To say - as did the California Supreme Court in the case at

8/ Continued:

this Court explained that "[t]he value compensable under the Fifth Amendment, . . ., is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent." California statutory law expressly makes business goodwill constitutionally protected under that criterion as well. Cal. Bus. & Prof. Code §14102 provides: "The good will of a business is property and is transferrable." (Emphasis added.)

bench - that an interest may be "property" for all purposes in statutory and decisional law (including the state constitutional purpose of taxation - cf. Cal. Const., Art. 13, §§1,2), but it somehow loses its status as "property in a constitutional sense" only for eminent domain purpose (15 Cal.3d at 819-820, 543 P.2d at 909-910) is to flout the very essence of this Court's teaching in Willow River, supra, and to supplant the Fifth Amendment's "just compensation" guarantee with semantic legerdemain. Since it is the states that decide in the first instance what constitute property interests,[9/] the Fourteenth Amendment's restraint on the states, forbidding deprivation of property without due process of law, would be reduced to idle words if a state could define an economic interest as "property" for all purposes and then say that nonetheless that property is not

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9/ See United States ex rel. T.V.A. v. Powelson (1943) 319 U.S. 266, 279; Sauer v. New York (1907) 206 U.S. 536, 548. For an extensive collection of federal cases articulating and applying this rule, see Annotation, 1 A.L.R. Fed. at 482-483.

constitutionally protected property. The concept of property as a constitutionally protected institution could be thus reduced to a now-you-see-it-now-you-don't game of shifting definitions. The fact that in the case at bench, this sort of constitutional evasion was accomplished by the judicial branch of the state government, in no way legitimizes the result; the judicial branch of state government is bound by the due process clause of the Fourteenth Amendment the same as the other two branches. Hughes v. Washington (1967) 389 U.S. 290; see Sotomura v. County of Hawaii (1975, D. Haw.) 402 F. Supp. 95.

Thus, while it may be permissible for a state to decide that business goodwill is not property, and make it non-compensable in eminent domain on that basis (see e.g., Edmands v. Boston [1871] 108 Mass. 535, 549), it is both illogical and arbitrary for California to declare business goodwill to be property, taxable as such and subject to all rights, burdens and restraints imposed by state law on property, and yet not be deemed

property for eminent domain purposes only. Surely, individual citizens' constitutional rights are made of more solid stuff.

Wholly aside from the due process implications of such semantic and conceptually insubstantial delineation of constitutionally protected property rights (see Hughes v. Washington, supra), there is also present here a clear violation of the equal protection guarantee. It is utterly arbitrary for a state to thus remove an otherwise fully legally protected and taxable property right[10/] from the ambit

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10/ As this Court noted in Great Northern R. Co. v. Weeks (1936) 297 U.S. 135, 139, the principles of valuation of property are the same in taxation as in eminent domain. This is of particular significance to California whose Constitution (Art. 13, §1), and statutes (Cal. Rev. & Tax Code §201) authorize only the taxation of property, and whose decisional law (Bank of California v. San Francisco [1904] 142 Cal. 27, 75 Pac. 832; Miller & Lux v. Richardson [1920] 182 Cal. 115, 127-128, 187 Pac. 411, 416), deems business goodwill to be property for taxation purposes. Thus, the arbitrary nature of excluding business goodwill from California's constitutional protection while including it within the scope of constitutional burdens (i.e., taxation), is self-evident, and clearly transgresses

(Continued)

of constitutional protection, on the basis of a judicial ipse dixit that it may be "property" for all purposes except that of constitutional protection.

It seems to Mr. Abrams that little argument need be devoted to this proposition. How can an interest be "property" within the burdens imposed by the California Constitution (Art. 13, §1), and at the same time not be "property" within the protection of that very same Constitution (Art. I, §19)? If that is not arbitrary and capricious, then what is?

10/ Continued:

the rationality standard of the equal protection guarantee.

THE ASSUMPTIONS ON WHICH REST THE 19th CENTURY RULE OF NON-COMPENSABILITY OF BUSINESS LOSSES IN EMINENT DOMAIN ARE UTTERLY UNFOUNDED AND IRRATIONAL IN THE CONTEXT OF TODAY'S URBAN MASS CONDEMNATIONS

The rule of non-compensability of business losses arose in this Country[11/]

11/ It is a historical anomaly that in spite of the fundamental policy of the American Constitution's guarantee of "just compensation" for the taking of private property for public use, business losses have been ignored by the courts of this Country. Yet other countries, without any such compulsion of their respective organic laws, have readily granted compensation for such losses. See Bigham, supra, 24 Vanderbilt L.Rev. 63. What is the final touch of irony is that even the law of the Soviet Union (which reputedly recognizes no private property rights) provides compensation for ". . . expenses paid or to be paid for the restoration of husbandry and trade prejudiced by the act of 'expropriation', or the costs resulting from reinstating husbandry or trade on another spot by reason of annulment of land tenure for the needs of the State or society"; quoted in Vondracek, Compensation for Losses Resulting from Acts of Public Policy in Soviet Law, in "Compensation for Compulsory Purchase: A Comparative Study", (1975, United Kingdom Comparative Law Series) at p. 233, emphasis added.

in the 19th Century in the context of a largely rural society in which land was in seemingly inexhaustible supply and freely available. Contemporary descriptions of mid-19th Century land acquisition practices vividly document the fact that land was often given gratis to the condemning entity because the owners wanted thereby to secure to their community the economic benefits anticipated from the contemplated project (often a railroad).[12/] See Comment, supra, 67 Yale L.J. at 65.

It was in that historical context that the courts of this country first reasoned that the displacement of a business by an occasional condemnation caused no compensable harm because if a rare shopkeeper or artisan of a 19th Century America found himself displaced by a public land acquisition he could put his goods on a wagon and move down the street to a new location where he was still known, there to carry on his trade without serious disruption. Thus, the notion

12/ See John Sherman's Recollections of Forty Years in the House, Senate and Cabinet: An Autobiography, Vol. 1, p. 81 (1895)

that the displaced business condemnee could relocate and take his business goodwill with him became the rationale of the American rule. See e.g., Banner Milling Co. v. State (1925, N.Y.) 148 N.E. 668, 670; In re Edward J. Jeffries Homes, etc. (1943, Mich.) 11 N.W.2d 272, 276. Indeed, as recently as 1949, this Court expressly endorsed this rationale in Kimball Laundry Co. v. United States, 338 U.S. at 11, and called it a "remote possibility" that the displaced businessman-condemnee might not be able to find a suitable replacement site for his business (Id. at 15).

But whatever the ethical and intellectual merits of that notion may have been when it was first formulated in the 1800's, the world changed drastically in the late 1950's. The dual impact of the Federal Aid Highway Act of 1956 and this Court's expansive endorsement of urban redevelopment in Berman v. Parker (1954) 348 U.S. 26, sent an army of bulldozers rumbling through American cities on a theretofore undreamed of scale. What made these mass urban condemnations vastly different than anything that preceded them was their

elimination of entire neighborhoods, and their total restructing of large urban areas.[13/] The problem became further exacerbated by the equally notorious fact that -particularly in urban redevelopment cases - the length of time between the condemnations and significant re-use of the land is usually unconscionably long,[14/] and that the indigenous population that formed the clientele of the displaced businesses is scattered to the four winds.

13/ Right outside the Court's window, as it were, virtually the entire South West section of the District of Columbia was bulldozed to the ground (save only Fort McNair, The Amidon School and the nearby Junior High School, and one or two buildings of historical significance). Surely it is so notorious as to be judicially noticeable that the "new" South West built on that land, bears not the slightest resemblance to the former neighborhood in economic, social, esthetic or commercial terms. The local shopkeepers were thus not only displaced but deprived of any realistic opportunity to reestablish their enterprises and to recapture any of their business goodwill.

14/ I.e., a decade in the case of South West Washington. In Los Angeles, the Bunker Hill (downtown) redevelopment project began bulldozing in 1962; today most of the condemned land is still vacant.

Because of these intrinsic features of today's mass urban condemnations, it becomes literally impossible for small businessmen to relocate.

This conclusion is borne out by impartial governmental studies. Both Congressional hearings[15/] and studies of the Advisory Commission on Intergovernmental Relations[16/] have demonstrated without dispute that the 19th Century theory of the condemnee's supposed ability to relocate his business bears little relation to the mid-20th Century reality. Far from being the "remote possibility" envisioned by Mr. Justice Frankfurter (when he spoke in 1949 for this Court in Kimball Laundry; see 338 U.S. at 15), the inability to relocate one's business becomes an imminent threat to all businessmen in the bulldozer's path, and a certainty to over one-half individually owned small businesses that rent their premises (see Reports cited in fn. 4 and 5, supra).

15/ See fn. 4 , supra.

16/ See fn. 5 , supra.

In sum, this case presents the Court with a candidly 19th Century rule that may have made sense at its inception over a hundred years ago, but which today, as applied to real people in a real world, is cruel and irrational.[17/] If ever there was an issue ripe - if not overripe - for judicial re-examination, this is it.

3.

THE APPLICATION OF THE CALIFORNIA RELOCATION ACT TO MR. ABRAMS' FACTUAL SITUATION CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF THE LAW

The pertinent statute (Cal. Gov't. Code §7262) provides for payment to owners of taken businesses unable to relocate a

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17/ This conclusion is no more than what has been said more eloquently and more forcefully by all legal commentators who have expressed themselves on the subject; see commentaries cited at pp. 12-13 supra. See particularly the Minnesota Supreme Court's collection of scholarly commentaries in State v. Saugen (1969, Minn.) 169 N.W.2d 37, 44, uniformly noting the incompatibility of Mitchell v. United States (1925) 267 U.S. 341, with modern authorities.

sum not to exceed $10,000 or the cost of relocating the taken business' stock, whichever is less. It is the cost of relocation phase of that legislation which Mr. Abrams challenges as arbitrary in application and repugnant to the equal protection clause.

The use of the moving cost limitation renders the statute wholly arbitrary, as the amount of money paid thereunder to a particular condemnee bears no relationship to the loss suffered (nor any other rational criterion), but is instead determined solely by how bulky or fragile and how expensive to move is the stock of a particular business. Thus if the taken business should happen to be a lumber yard (for example) the bulk and weight of the lumber and other building materials may well result in such high moving costs as to provide the owner the full $10,000 payment, or a sum close to it. In contrast, a businessman such as Mr. Abrams, whose stock consists of expensive medicines (largely high-potency tranquilizers) of low bulk would receive a pittance, as the moving cost of his low-bulk goods is

certain to be negligible ($10,000 worth of high potency tranquilizers can be easily transported in a station wagon, or the trunk of a large passenger automobile).

Thus, the upshot is that Cal. Gov't. Code §7262, as applied to these facts is utterly arbitrary, bearing no rational relationship to the loss suffered; indeed, it is counterproductive to the essence of the legislative intent.[18/]

18/ The controlling Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (P.L. 91-646) and its conforming California Legislation, has as its express purpose the assurance of equal treatment of displaced condemnees (see 42 U.S.C. §4621, and Cal. Gov't. Code §7267). Yet, as applied, to these facts the statute virtually assures inequality of treatment by making the happenstance of the nature of the stock of a particular business the sole criterion of money actually paid.

THE OPINION BELOW MISCONSTRUES THE LAW LAID DOWN BY THIS COURT

A. The California Supreme Court Consciously Declined to Follow Constitutional Criteria Established by This Court

It is the essence of modern theory of compensability in eminent domain that the test is an inquiry as to whether the aggrieved property owner is called upon to bear a disproportionate share of the cost of the public project for which his property is being taken. This Court could not have been clearer:

> "The Fifth Amendment's guarantee[19/] that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." Armstrong v. United Srates (1960) 364 U.S. 40, 49.

Yet, the court below failed to apply this test. This occurred in spite of the fact that said court expressly acknowledged that on the facts such as at bench, the effect of adherence to the old rule of non-compensability ". . . is in effect to require the affected parties to bear a disproportionate share of the true cost of the public undertaking." (15 Cal.3d at 826, 543 P.2d at 914.)

The discord which the opinion below thus creates with this Court's constitutional principle is clear, and warrants review by this Court.

B. The California Supreme Court Distorted the Teaching of Kimball Laundry

The opinion below goes to some lengths in purporting to extract from Kimball Laundry a rule that business losses are compensable only when the condemnation

19/ That the Fifth Amendment's just compensation guarantee is binding on the states through the due process clause of the Fourteenth Amendment has been settled law since Chicago B. & Q.R. Co. v. Chicago (1897) 166 U.S. 226.

"in and of itself" (15 Cal.3d at 834 and 825, 543 P.2d at 920 and 913) causes such loss. With due respect to the court below, no such rule appears anywhere in Kimball. On the contrary, Kimball expressly recognizes that when "the inevitable effect" of the condemnation is to preclude the owner from re-establishing his business he is entitled to compensation (338 U.S. at 13, emphasis added). Thus, Kimball deals with the effect, not the nature of the condemnation.[20/] Here, because the taking was not merely of Mr. Abrams' parcel, but of a 20 square block area containing the neighborhood's business section, the "inevitable effect" of this taking was to render it impossible for Mr. Abrams to relocate. Mr. Abrams' infirmity further exacerbated his predicament - not only could he not reopen and recapture his existing business goodwill, but also it was impossible for him to start a new business elsewhere and build up new goodwill all over again.

20/ Expressly giving effect to the loss to the owner criterion. See 338 U.S. at 13.

Kimball goes on to point out that public utilities receive compensation for their business goodwill because they cannot relocate (338 U.S. at 13) as the nature of their business would make it unprofitable (Id. at 12-13). This is then contrasted with situations where ". . . the owner remained free to transfer [his goodwill]" (Id. at 13).

While decades ago the owner's postulated "free[dom] to transfer" was real and exceptions to it were so rare as to justify the characterization of "remote possibility" (Id. at 15), that is no longer true. Indeed, the court below quite properly took judicial notice (15 Cal.3d at 825, 825, 543 P.2d at 914) that conditions of modern American life have grossly changed the impact of large scale, urban public projects. Where - as at bench - the taking consists of some 20 city blocks containing the area's business district, there simply isn't anywhere to relocate! The owner's plight on these facts is certain; his inability to relocate anywhere where his existing business goodwill can be salvaged is a

total certainty - not a "remote possibility".

In sum, the court below misconstrued Kimball Laundry's reasoning, particularly as applied in the context of today's urban reality.[21/]

CONCLUSION

First. In the final analysis, Mr. Abrams asks of the Court that it give effect to the principle of Constitutional construction so well stated in Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 387:

> ". . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

21/ It deserves emphasis that Kimball was decided more than a decade before the waves of urban redevelopment swept over American cities, causing a drastic change in conditions that obtained when the rule brought here for review was formulated.

This is 1976 - not 1876. The conditions that prevailed in the America of the 19th Century, that gave birth to the rule brought for review here, are no more. The small, one-location urban merchant in the 1970's, whose business, along with the surrounding neighborhood, falls prey to the bulldozer, in most cases is no more capable of relocating then he is of levitating. The express assumption of Kimball Laundry that such a person's inability to relocate was in the nature of "remote possibility" has become a casualty of changing urban conditions in the last two decades; it is now a fiction that lacks any validity as applied to the facts at bench. That has been amply demonstrated by objective studies (see fn. 4 and 5, supra) which have not been controverted.

Thus, the inevitable effect of large scale urban condemnations is to inflict greivous injury on completely innocent people; good, hard-working people who

form the backbone of our society. Worse than that, the present rule so operates as to work its evil with particular viciousness on older people who have literally spent their lifetimes building up their businesses as sources of livelihood and security for their declining years, only to discover that to them the Constitutional promise of "just compensation" is an illusion.

It is respectfully submitted that the principles of fundamental fairness that form the cornerstone of Constitutional interpretation, and which this Court has so freely bestowed over the recent years on less deserving segments of society, ought to be applicable to law abiding citizens as well. As this Court so aptly noted in Camara v. Municipal Court (1967) 387 U.S. 523, 530, it surely would be anomalous to say that the Constitution protects a citizen's rights only when he is charged with criminal misconduct.

> ". . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have

rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." (Lynch v. Household Finance Corp. [1972] 405 U.S. 538, 552; emphasis added.)

The same measure of fairness and the same recognition of changed conditions that has led to re-examination of traditional rules of constitutional law as applied to the rights of murderers,[22] pornographers,[23] abortionists,[24] or

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22/ Escobedo v. Illinois (1964) 378 U.S. 478; Miranda v. Arizona (1966) 384 U.S. 436.

23/ Miller v. State of California (1973) 413 U.S. 15; Jenkins v. State of Georgia (1974) 418 U.S. 153.

24/ Roe v. Wade (1973) 410 U.S. 113; Doe v. Bolton (1973) 410 U.S. 179.

juvenile offenders[25] surely ought to be applied to the rights of innocent citizens who have done nothing wrong but who find themselves victimized by ambitious projects, often undertaken for private pecuniary benefit of redevelopers.

> "The fact is that an ever increasing amount of shameless and needless damage and havoc are wreaked on the lives and fortunes of citizens and taxpayers whose only fault is that they own real property which is coveted by one or more of the myriad agencies which wisely or not, have been entrusted with this terrible power which we call eminent domain." Bryant, Eminent Domain-Its Use and Misuse, 39 Univ. of Cincinnati L.R. 259 (1970).[26]

25/ Application of Gault (1967) 387 U.S. 1.

26/ In light of the heavily colored language in the quoted passage, it must be pointed out that the author's conclusions are based on his many years of experience as attorney for condemnating agencies. Id. at 266, fn. 21.

Second. Wholly aside from the above considerations, it is shocking for a State to declare business goodwill to be property by its statutory and decisional law, to tax it as such, and to submit its owner to all legal burdens of ownership of this species of property, and yet say that it is freely subject to destruction and confiscation by eminent domain. That is a rule that defies reason, and could well serve as a textbook example of arbitrariness and denial of equal protection of the laws.

Mr. Abrams prays that the Court bring some measure of today's Constitutional principles into this 19th Century dark corner of the law. He prays that the writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, Plaintiff and Appellant, vs. ARTHUR J. ABRAMS, Defendant and Appellant.	L.A. 30380 Super. Ct. No. 997048 Supreme Court Filed Dec. 29, 1975 G.E. Bishel, Clerk.

In this action in eminent domain both parties have appealed from a judgment which, inter alia, awarded compensation to the condemnee, a pharmacist, for the value of certain "ethical drugs" located on the condemned real property but refused to award any compensation for loss of business goodwill resulting from the taking. In dealing with the questions thus presented we are required to address a broad question of constitutional law which, to borrow the image used by one learned commentator in a similar context, has proved remarkably

"resistant to analytical efforts."[1/] (See Sax, Takings, Private Property and Public Rights (1971) 81 Yale L.J. 149, 149.) Simply stated, the question is this: When and to what extent do the state and federal Constitutions require that the "just compensation" to be paid upon the taking or damaging of private property for public use [2/] include payment over and above the fair market value of the property taken on account of business losses sustained by the condemnee as a result of the taking?

Sixty years ago we answered this question in decisive fashion, and thereby stated the rule which presently applies in this state and, generally speaking, in

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1/ The commentators have given eloquent testimony to the durability of the problem. (See, e.g., Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View (1970) 24 Vand.L.Rev. 63; Kanner, When is "Property" Not "Property Itself": A Critical Examination Of The Bases of Denial of Compensation For Loss of Goodwill In Eminent Domain (1969) 6 Cal.Western L.Rev. 57; Note, The Unsoundness of California's Noncompensability Rule As Applied to Business Losses in Condemnation Cases (1969) 20 Hastings L.J. 675; Aloi & Goldberg, A Reexamination of Value, Good Will and Business Losses in Eminent Domain (1968) 53 Cornell L.Rev. 604; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law (1967) 80 Harv.L.Rev. 1165; An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings (1966) 3 Harv.J.Legis. 445; Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law (1962) 1962 Sup.Ct.Rev. 63; Spies & McCoid, Recovery of Consequential Damages in Eminent Domain (1962) 48 Va. L.Rev. 437; Note, Eminent Domain Valuations in An Age of Redevelopment: Incidental Losses (1957) 67 Yale L.J. 61; Cormack, Legal Concepts in Cases of Eminent Domain (1931) 41 Yale L.J. 221.)

2/ The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, (Chicago, Burlington, etc. R'd v. Chicago (1897) 166 U.S. 226, 233-241), provides in relevant part: "... nor shall private property be taken for public use, without just compensation."

Article I, section 19 (replacing former art. I, §14) of the California Constitution provides in relevant part: "Private property may be taken or damaged for public use only when just compensation ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

all other jurisdictions of this nation.[3/] " ... [t]he real contention of appellant ... [is] that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law. It is quite within the power of the legislature to declare that a damage to that form of property known as business or the good-will of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or an inconvenience to a business is damnum absque injuria, and does not form an element of the compensating damages to be awarded." (Oakland v. Pacific Coast Lumber etc. Co. (1915)

3/ See generally 4 Nichols, Eminent Domain (3d ed. 1974) section 13.3, pages 13-148.2 - 13.165; 1 Orgel, Valuation Under The Law of Eminent Domain (2d ed. 1953) sections 1, 66-77, pages 1-11, 303-334.

171 Cal. 392, 398.

It now appears that while this matter was pending on appeal the Legislature acted in this respect. New section 1263.510 of the Code of Civil Procedure -- signed into law by the Governor on October 1, 1975, as a part of a comprehensive revision of the eminent domain law of this state -- will operate to render goodwill compensable to a certain extent in cases arising on or after January 1, 1976 (see new § 1230.065). This legislation, however, as all parties hereto readily concede, can have no application to the present proceeding, which was commenced in 1971 -- nor shall what we have to say below be construed to reflect any views on the part of this court relative to the validity or interpretation of the legislation itself. In the posture of the instant case, the question remains one of constitutional dimension: Must the settled rules of constitutional interpretation in this area now give way, in light of the changing conditions of urban society, to rules of similar constitutional stature

providing for compensation for lost business goodwill and other incidental damages consequent upon exercise of the power of eminent domain?

I

The facts of the case before us are these: In the course of implementing its Watts Redevelopment Project, the Community Redevelopment Agency of Los Angeles (Agency) brought this action in eminent domain to acquire real property owned by defendant Arthur J. Abrams. For 27 years preceding the trial Abrams, a pharmacist, had operated his pharmacy on the subject property. His parcel lay within an area of approximately 20 square blocks condemned for the project, and the total condemnation not only took the pharmacy property but eliminated the neighborhood from which Abrams' clientele came.

In his answer to the complaint he claimed as elements of the just compensation required by constitutional provisions (see fn. 2, ante) not only the value of the real property but also (1) the value of his inventory of so-called "ethical

drugs" -- or drugs which may be sold only on prescription -- which were in opened containers, and (2) the value of his business goodwill. In support of the latter element Abrams alleged that by reason of his age (64) and a rheumatoid arthritis condition from which he suffered he was incapable of relocating his business in a new area and thereby retaining or maintaining his business goodwill, and that as a result of this circumstance and the further fact that under state law his inventory of "ethical drugs," insofar as it was in containers already opened, could not be sold to another pharmacist without a certification of purity -- the cost of which would exceed the value of the subject drugs -- his inventory of "ethical drugs" in opened containers would be rendered valueless by the taking of his real property.

The trial court found on the basis of substantial evidence that by reason of his age and physical condition Abrams was incapable of relocating his business in a new area; that the business goodwill of Abrams' pharmacy had been taken, damaged, and destroyed by the taking of

his real property; and that the market for Abrams' stock of "ethical drugs" had likewise been destroyed. As here relevant it concluded as a matter of law that Abrams was entitled to compensation pursuant to article I, section 14, of the state Constitution for his stock of "ethical drugs" in open containers, but that he was not entitled to be compensated for business goodwill. On the basis of these findings and conclusions the trial court awarded Abrams $10,000, the stipulated value of the drugs in open containers, in addition to the value which the jury placed on the real property and fixtures; no award was made for loss of business goodwill. These appeals followed.

II

Defendant Abrams' arguments on the subject of compensation for business goodwill proceed on two distinct levels. The first is a general attack on the rule of noncompensability, based upon its asserted irrational and arbitrary character. The second is more specific, based upon the particular facts of this case: It

urges that whatever be the general rule as to the compensability of business goodwill, compensation should be made when the condemnee is incapable of relocating his business and thus transferring <u>any part</u> of his goodwill. We first address ourselves to the more general challenge.

It is urged that the rule of noncompensability for business goodwill is irrational because goodwill is itself "property" in this state and as such should be subject to compensation like any other "property." It is pointed out that goodwill is declared by statute to be property;[4/] that it is treated as such

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4/ Section 654 of the Civil Code provides: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

Section 655 of the Civil Code provides: "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, <u>the good will of a business</u>, trade marks and signs, and of rights created or granted by statute." (Italics added.)

(fn. Cont'd)

in matters of private law in the areas of tort (see Carrey v. Boyes Hot Springs etc. (1966) 245 Cal.App.2d 618, 622-623), contract (see Lyon v. Lyon (1966) 246 Cal.App.2d 519), business affairs (see Smith v. Bull (1958) 50 Cal.2d 294), marital dissolution (see In Re Marriage of Foster (1974) 42 Cal.App.3d 577), and probate (see Rankin v. Newman (1896) 114 Cal. 635); and that it is taxable as such (Cal. Const., art. XIII, §§ 1, 2; Miller & Lux, Inc. v. Richardson (1920) 182 Cal. 115, 127-128; Bank of California v. San Francisco (1904) 142 Cal. 276, 288-289, cf. dis. opn., pp. 291-292). The only area in which business goodwill is denied the status of property, defendant asserts, is when the government "takes and destroys" it for public use. The result, it is urged, is not only a violation of constitutional "just compensation" clauses (see fn. 2, ante) but a denial of equal protection of the laws.

4/ (Cont'd)
Section 14102 of the Business and Professions Code provides: "The good will of a business is property and is transferable." (Italics added.)

The foregoing contentions betray a fundamental misunderstanding. The courts of this state have never taken the position that business goodwill is not property -- indeed, such a position would be wholly inconsistent with statutory provisions to the contrary (see fn. 4, ante). What the courts have established is that "that form of property known as business or the goodwill of a business" (Oakland v. Pacific Coast Lumber etc. Co., supra, 171 Cal. 392, 398) is not the form of property to which constitutional provisions requiring just compensation refer. As the leading commentator has stated the essentially universal rule, "An established business, or what is called 'good will,' has never been held to be by itself property in the constitutional sense.[1] ... [¶] While it may be an added element of value to a particular piece of land taken, a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the

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"1 Good will is generally held property in matters of private law. . . ."

constitution undertakes to protect absolutely. Although in some cases the destruction of an established business works a much greater hardship than many injuries for which the constitution makes compensation necessary, diminution of its value is considered a vaguer injury than the type of taking or appropriation with which the constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted or by a change in the location of a railroad station, a subway entrance, or even a transfer point for street care [sic](as well as by competition), but there would be as little claim in the one case as in the other. [¶] The case is no different when the business is destroyed by taking the land on which it was conducted." (4 Nichols, Eminent Domain, supra, §13.3, pp. 13-148.2 - 13-149.3; fns. 2 and 3 omitted; italics added.)[5/]

5/ Compare 1 Orgel, Valuation Under Eminent Domain, supra, section 1, page 5: "It goes without saying that the courts have never construed the 'just compensation' clause of a federal or state constitution as requiring payment (Cont'd)

It is clear from the foregoing that defendant's linguistic arguments based upon the status of goodwill as property simply ignore established precedents and, in so doing, beg the real question we face today. The fact that business goodwill is legislatively declared to be property and is treated as such in various legal contexts, does not render per se irrational a rule which refuses to treat it as such in a constitutional sense for purposes of awarding compensation in eminent domain. The inquiry must go much deeper -- into an examination of the reasons for this distinction. Only when that examination has been made can it be determined whether the considerations of constitutional policy underlying it are presently valid.

Before turning to the indicated task we address ourselves to another contention of defendant which appears to us to be equally superficial. It is contended

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5/ (Cont'd) for all injuries imposed upon persons or property by acts of government. Any such requirement would make government itself impossible."

that the general rule denying compensation for loss of business goodwill is arbitrary because it is "shot through" with exceptions. The first such exception to which defendant refers is that relating to the condemnation of public utilities. (See Southern Calif. Edison Co. v. Railroad Com. (1936) 6 Cal.2d 737, 750-751.) However, it must be noted that compensation awarded by the Public Utilities Commission for goodwill or going-concern value of public utilities is based upon wholly separate constitutional and statutory provisions.6/ The

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6/ Article XII, section 5, of the California Constitution provides: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain." (Italics added.)

Section 1411 of the Public Utilities Code provides in relevant part: "When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the (Cont'd)

Southern California Edison case itself points this out at the pages above cited. Surely a rule of compensation based upon

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6/ (Cont'd) political subdivision for the lands, property, and rights." (Italics added.)

The fact that the law provides two distinct methods for governmental acquisition of public utilities -- proceedings before the commission pursuant to section 1401 et seq. of the Public Utilities Code, and judicial eminent domain proceedings pursuant to section 1237 et seq. of the Code of Civil Procedure (see Citizens Utilities Co. v. Superior Court (1963) 59 Cal.2d 805, 814-815; City of North Sacramento v. Citizens Utilities Co. (1963) 218 Cal.App.2d 178, 181 -- does not, as defendant suggests, "create serious equal protection problems" due to differing substantive measures of recovery according to the method chosen. As we said in Citizens Utilities Co. v. Superior Court, supra, it was the clear intent of the Legislature to create alternative methods of procedure, and that procedure authorized by the Public Utilities Code should not be held to be exclusive of the judicial method "at least so long as no constitutional or other rights are violated by the procedure under the Code of Civil Procedure." (59 Cal.2d at p. 815; see also Marin M.W. Dist. v. Marin W. etc. Co. (1918) 178 Cal. 308, 316.) It is manifest that the measure of compensation vouchsafed a public utility by the Public Utilities Code -- i.e. "just compensation ... for [its] lands, (Cont'd)

constitutional and statutory provisions other than those we now consider can hardly be deemed an "exception" to the rule applicable under the provisions before us. Moreover, we find no merit in the claim that the allowance of compensation for going-concern value in public utilities cases, viewed alongside the denial of such compensation in cases not involving public utilities, results in a denial of equal protection of the laws. The rational basis for this distinction is clear: "In the first place, the utility plant is uniquely adapted to the enterprise and cannot be separately sold. In the second place, the plant is so intimately connected with the remainder of the enterprise that the taking of the one necessarily means the destruction of the other. In the third place, while in the ordinary real estate condemnation, the taker acquires the property intending to convert it to a different use, in the

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6/ (Cont'd) property, and rights" -- is also to be accorded it in proceedings under the Code of Civil Procedure. (See Citizens Utilities Co. v. Superior Court, supra, 59 Cal.2d at p. 817.)

condemnation of a public utility the taker not only destroys the company's chances of re-establishing the business but itself receives the benefit of customer connections, personnel and other intangible aspects of the enterprise." (2 Orgel, Valuation Under Eminent Domain, supra, pp. 58-59.)

Defendant's search for "exceptions" to the general rule denying compensation for loss of business goodwill next leads him to make reference to various instances in which evidence of lost business profits is taken into account in making an award for government taking or damage. He points out that such evidence may be considered in certain cases of inverse condemnation in arriving at the difference between the value of the real property before and after the injury (see Natural Soda Prod. Co. v. City of L.A. (1943) 23 Cal.2d 193, 199-201; Inyo Chemical Co. v. City of Los Angeles (1936) 5 Cal.2d 525, 542-543; Frustuck v. City of Fairfax (1963) 212 Cal.App.2d 345, 367); that it may likewise be regarded in cases of severance damage in order to determine

whether and how the value of the remainder for its immediate highest and best use has been affected (see Ventura County Flood Control Dist. v. Security First Nat. Bank (1971) 15 Cal.App.3d 996, 1002-1003, and cases there cited; People ex rel. Dept. Public Works v. Giumarra Vineyards Corp. (1966) 245 Cal.App.2d 309, 319-320); that it may also be considered in cases involving a temporary taking (see Kimball Laundry Co. v. United States (1949) 338 U.S. 1, 8-21); and, finally, that it is taken into account in determining the capitalized value of a leasehold interest in condemned realty (see Evid. Code, §§ 817, 819). We are again at a loss, however, to understand how these rules may be considered "exceptions" to the rule here challenged. In each case to which defendant has reference the courts have been careful to explain that considerations entirely different from those underlying the rule of noncompensability for business goodwill require the application of an entirely different rule.

The case of Kimball Laundry Co. v.

United States, supra, 338 U.S. 1, provides an instructive example. There the federal government during the Second World War had acquired the petitioner's laundry plant, which it continued to operate as a laundry for the army, retaining most of the petitioner's employees. The taking was not permanent but was subject to renewal at the election of the Secretary of War, and the property was returned to the petitioner at the conclusion of the war. Agreeing with the trial court that the proper measure of compensation was the rental that probably would have been obtained in free bargaining between the petitioner and a hypothetical lessee of the temporary interest, and that damage to machinery in excess of ordinary wear and tear should also be compensated, the United States Supreme Court went on to consider the petitioner's claim for incidental damages for the destruction of its "trade routes" -- which term "serves as a general designation both for the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage." (338 U.S. at p.

8.) The trial court had denied compensation in this respect, holding that such damage did not bear upon the "fair market value or fair use of the property taken" (id.) but the high court reversed. Holding that the value alleged to inhere in the petitioner's trade routes was essentially the going-concern value of its business, and that the intangible nature of this value did not in and of itself preclude compensation for it,[7/]

7/ "The value of all property, as we have already observed, is dependent upon and inseparable from individual needs and attitudes, and these, obviously, are intangible. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future. [Citations.] The only distinction to be made, therefore, between the attitudes which generate going-concern value and those of which tangible property is compounded is as to the tenacity of the past's hold upon the future: in the case of the latter a forecast of future demand can usually be made with greater certainty, for it is more probable on the whole that people will continue to want particular goods or services than that they will continue to look to a particular supplier of them. It is more likely, in other words, that people will persist in wanting to have their laundry done

the court went on in several illuminating passages to explain the circumstances under which compensation for such a value would be required by the Constitution.

"What, then, are the circumstances under which the Fifth Amendment requires compensation for such an intangible? Not, indeed, those of the usual taking of fee title to business property, but the denial of compensation in such circumstances rests on a very concrete justification: the going-concern value has not been taken. Such are all the cases, most of them decided by State courts under constitutions with provisions comparable to the Fifth Amendment, in which only the

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7/ (Cont'd) than that they will keep on sending it to a particular laundry. But as the probability of continued patronage gains strength, this distinction becomes obliterated, and the intangible acquires a value to a potential purchaser no different from the business' physical property. Since the Fifth Amendment requires compensation for the latter, the former, if shown to be present and to have been 'taken', should also be compensable." (Kimball Laundry Co. v. United States, supra, 338 U.S. 1, 10-11; italics added.)

physical property has been condemned, leaving the owner free to move his business to a new location. [Citations.] In such a situation there is no more reason for a taker to pay for the business' going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss, like the cost of moving, is denied compensation as consequential. [Citation.] But such value as the good will retains, the owner keeps, and the remainder dissipated by removal would not contribute to the value paid for by a transferee of the vacated premises, except perhaps to the extent that the prospect of its loss would induce the owner to hold out for a higher price for his land and building. Cf. United States v. General Motors Corp., 323 U.S. 373, 383. When a condemnor has taken fee title to business property, there is reason for saying that the

compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See Sawyer v. Commonwealth, 182 Mass. 245 ..., per Holmes, C.J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. Mitchell v. United States, 267 U.S. 341." (338 U.S. at pp. 11-12.)

At this point the Kimball court went on to contrast the foregoing situation with that in which the inevitable effect of a taking is to deprive the owner of the going-concern value of his business -- giving as an example the area of public utility condemnation. "If such a deprivation has occurred," the court concluded, "the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it," and compensation should be awarded accordingly. (338 U.S. at p. 13.)

Finally, applying this latter principle to the case before it, the Kimball court made a series of observations pertinent to the issue before us at this time. The temporary taking of the petitioner's premises, the court held, completely appropriated its opportunity to profit from its trade routes -- just as completely as a promise not to compete would have done. While the government remained in possession, the petitioner's investment remained bound up in the reversion. While the trade routes remained technically capable of transfer independently of the physical property with which they had been associated, it was "wholly beyond the realm of conjecture" that they could have been temporarily transferred subject to recapture. "It is arguable, to be sure," the court went on, "that since an equally suitable plant might conceivably have been available to the petitioner at reasonable terms for the same period as the Government's occupancy of its own plant, and since that would have enabled it to stay in business without loss of going-concern value, it is irrelevant

that no such premises happened to be available, as it would have been irrelevant, under a strict application of Mitchell v. United States [supra] had the Government taken the fee. When fee title to business property has been taken, however, it is fair on the whole that the amount of compensation payable should not include speculative losses consequent upon realization of the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value. But when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility -- the temporary transfer of going-concern value -- might have been realized. The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result." (338 U.S. at pp. 14-15.)

We learn from the foregoing that the rule denying compensation for business goodwill, far from being "shot through" with exceptions, is uniformly applied in all cases to which it is applicable -- i.e., in all cases wherein the condemnor takes the fee upon which a business is conducted and does not by the nature of its action wholly preclude the condemnee from transferring its going-concern or goodwill value to another location. We also learn that this rule is based on the conviction that it is "fair on the whole" to treat all such condemnees alike, refusing to create distinctions on the basis of "the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value." (Kimball, supra, at p. 15.) We are thus brought to the question which lies at the core of our inquiry: Does the erosion by modern conditions of the assumptions underlying this rule require its abrogation as a matter of constitutional law and its replacement with a constitutionally grounded and judicially administered rule of compensation more responsive to

present-day realities?[8/] It is to this question that we now turn our attention.

III

We judicially notice the following as facts "of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute" (Evid. Code § 451, subd. (f)): The conditions of modern American life, including the increased concentration of people in urban centers and the need for increased governmental activity in the areas of transportation and urban redevelopment, have resulted in the disruption and displacement of increased numbers of people and businesses by government projects. Moreover, the peculiar nature of urban redevelopment programs, which act upon large areas of contiguous property, often involves the uprooting of entire neighborhoods and the consequent

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8/ We re-emphasize at this point that we here consider defendant's general attack on the rule of noncompensability for business goodwill, not his more specific contention based on the particular facts of this case. The latter contention will be taken up in due course.

dispersal of their business and residential occupants to other areas. (See generally An Act to Provide Compensation For Loss of Goodwill Resulting From Eminent Domain Proceedings, supra, 3 Harv. J.Legis. 445, 447-448 (memo.); Note, Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses, supra, 67 Yale L.J. 61.)

While the effects of this process are severe in both a personal and social sense for the residential occupants of areas subjected to redevelopment, its effects upon business occupants may be even more serious. One such effect relates to the business goodwill which such a businessman has built up in the location of which he is deprived by condemnation. In some cases, as for example in the case of a mail order business whose clientele is not rooted in the area affected by redevelopment, business goodwill may be transferred with relative ease to a new location outside the redevelopment area. At the other end of the spectrum, however, are businesses which depend on a clientele within the

redevelopment area. In many such cases business goodwill is based almost wholly upon the businessman's personal acquaintance with his customers and his knowledge of their particular needs. Such goodwill is by its nature not freely transferable within the context of wholesale condemnation pursuant to urban redevelopment, for the inevitable effect of such condemnation is to disperse the businessman's clientele throughout the urban area, with the result that any new location chosen by him will be unable to continue to profitably serve a significant portion of them.

It is clear that to apply the rule of noncompensability for loss of business goodwill to cases in which the assumption underlying it -- i.e., that such goodwill is not "taken" or "damaged" but remains subject to transfer to a new location -- does not hold true is in effect to require the affected parties to bear a disproportionate share of the true cost of the public undertaking. It is the increased incidence of this occurrence, brought about by the modern urban conditions averted to above, which has been the basis of scholarly comment critical of

the rule. (See generally, materials cited at fn. 1, ante.) The question before us is whether these considerations require that we hold as a matter of constitutional law that business goodwill is now to be considered a compensable element of damage in eminent domain.

As we have repeatedly emphasized, it is the underscored language which is the kernel of the controversy before us. To recognize that there are substantial numbers of cases in which the assumption underlying the rule of noncompensability for business goodwill is not borne out by the particular facts is not necessarily to conclude that alteration of the constitutional rule is required. It is at this point that a consideration of institutional functions and capacities must come into play.

It is strenuously urged that because ultimate responsibility for determining the amount of compensation to be paid for property taken under constitutional "just compensation" clauses lies with the courts (see United States v. New River Collieries (1923) 262 U.S. 341, 343-344; Seaboard

Air Line Ry. v. United States (1923) 261 U.S. 299, 304; Monongahela Navig'n. Co. v. United States (1892) 148 U.S. 312, 327; County of Los Angeles v. Ortiz (1971) 6 Cal.3d 141, 145), it is the courts who must fashion rules insuring that losses of business goodwill occasioned through condemnation be compensated.

This argument, at least insofar as it implies that the sole institution which may provide standards of compensation is the courts, proceeds upon an invalid premise, to wit, that the "just compensation" prescribed by constitutional provisions contemplates total indemnification for damage sustained through condemnation. However, as we have pointed out above (see text accompanying fn. 5, ante), the law simply does not equate "just compensation" with total indemnification.9/ We have not far to look in

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9/ We are of course aware of language in some cases which indicates that "The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken from him." (People ex rel. Dept. Pub. Wks. v. Lynbar, Inc. (1967) 253 Cal.App.2d 870, 880; see also United States v. Miller (1942) 317 U.S. 369, 373.) This language which we

California jurisprudence for cases other than those involving business goodwill in which demonstrable loss resulting from condemnation has been held not to constitute an element of constitutionally required "just compensation." For example, in County of Los Angeles v. Ortiz, supra, 6 Cal.3d 141, we held that a condemnee's litigation expenses, although clearly resulting in a loss to the condemnee which he would not have sustained absent condemnation, did not, under a virtually unbroken line of authority, form an element of damage required to be paid by the Constitution. Such costs, we concluded, were "of policy as distinguished from constitutional dimension" and the allowance of their recovery rested with the Legislature rather than the courts. (6 Cal.3d at pp. 148-149.)10/

9/ (Cont'd) have previously characterized as "panoramic" (County of Los Angeles v. Ortiz, supra, 6 Cal.3d 141, 147), makes up in idealism what it lacks in universal application.

10/ Partial legislative response in this area has come in the form of new section 1249.3 of the Code of Civil Procedure (enacted in 1974), which

Similarly, in Town of Los Gatos v. Sund (1965) 234 Cal.App.2d 24, it was held that expenses of moving personal property involved in the business conducted on the condemned property, although clearly incurred by the condemnee as a result of the condemnation, were not compensable under constitutional "just compensation" provisions, and that any appeal for their allowance must be made to the Legislature.11/

10/ (Cont'd) requires the parties to make final settlement offers prior to trial and awards the defendant his litigation expenses when it appears after trial that the plaintiff's offer was unreasonably low Litigation expenses, including reasonable attorney's fees, appraisal fees, and fees for the services of other experts, are also awarded by statute when the eminent domain proceeding is ultimately abandoned (Code Civ. Proc., § 1255a) or the defendant secures a judgment that the condemnor may not acquire the real property (Code Civ. Proc., §1246.4). Further provisions in this area are included in the 1974 act (new Code Civ. Proc. §1268.610).

11/ Legislative response in this area appeared in 1971 amendments to the state Relocation Assistance Act, specifically with the addition of subdivision (2) (2) to section 7262 of the Government Code. We discuss this act in some detail below.

What these cases show is simply that compensation provided for the taking of real property through eminent domain may be "just" within the meaning of the constitutional provisions without providing complete reimbursement to the owner for all losses suffered by him as a result of condemnation, and that in at least some cases in which the constitutional measure of compensation falls demonstrably short of that required to make the condemnee "whole," his recourse must be to the Legislature.

The central issue, then, is whether compensation for loss of business goodwill should be included within the constitutional minimum required by "just compensation" clauses or whether it should continue to be excluded from that measure and remain subject to legislative competence for the redress of demonstrable losses. We have concluded that valid reasons of policy, based primarily upon considerations of institutional competence, counsel in favor of judicial deference to the legislative branch in fashioning standards and procedures responsive to present realities in this

area.

Loss of business goodwill due to condemnation of business premises is just one of a number of areas in which demonstrable loss and inconvenience are suffered by those who are uprooted from their homes and businesses by the modern phenomenon of urban redevelopment programs. The damage sustained ranges from the relatively imponderable (for example, educational damage caused young persons by mid-stream changes in schools) to the relatively tangible (for example, expenses incurred by a family or a business in moving personal property from condemned realty to a new location). In the specific area with which we are here concerned -- to wit, loss of business good will -- there are similar problems. Thus, even assuming as defendant insists that the goodwill possessed by a business at one location is capable of accurate translation into a dollar amount, to what extent must the assumption of transferability (upon which, as we have seen, the rule of noncompensability rests) break down in the particular case to justify compensation, and what amount of

compensation is appropriate when the breakdown of the assumption is less than total?

The courts, although rarely making explicit reference to the overall problem, have, by their case by case rulings in accordance with established principles such as that we consider today, demonstrated a fundamental awareness of the real dimensions of the underlying problem. In the words of one perceptive commentator, "the courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require." (Michelman, Property, Utility, and Fairness: Comments on The Ethical Foundations of "Just Compensation"

Law, supra, 80 Harv.L.Rev. 1165, 1252.)[12/]

12/ The cited article by Professor Michelman, which must be acknowledged a landmark in the field of compensation analysis, goes far to explicate the nature of the broad problem of compensation for public takings and the role of courts, legislatures, and other public bodies in providing solutions for that problem. Professor Michelman's thesis is stated in brief in the following paragraph from his article: "A serious objection to the habit of leaving fairness discipline to the courts is that we may thereby miss opportunities to make good use of settlement methods too artificial or innovative for judicial adoption. A court, it seems, must choose between denying all compensation and awarding 'just' compensation; the loss is either a 'taking' of 'property' or it is not. If 'just' compensation is essentially incalculable, or if the cost of computing it is very high, the court may be led to classify a situation as non-compensable. If choice must be relegated to this framework, we shall not be able to exploit the substitutability of settlement costs and demoralization costs. [*] It may be that even though that settlement which would reduce demoralization costs to zero would be prohibitively costly, there exists some relatively cheap form of settlement which would reduce demoralization costs so effectively that, by using it, we can reduce the total of settlement plus demoralization costs below what they would be in the absence of any settlement. Such a settlement technique, if

It is manifest that state and federal legislative bodies have begun to demonstrate their awareness of such obligations. The federal Uniform Relocation Assistance

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12/ (Cont'd) one exists, is very likely to require legislative adoption." (Michelman, supra, 80 Harv.L.Rev. at pp. 1253-1254; fns. omitted.)

* "'Demoralization costs' are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. 'Settlement costs' are measured by the dollar value of the time, effort and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs. Included are the costs of settling not only the particular compensation claims presented, but also those of all persons so affected by the measure in question or similar measures as to have claims not obviously distinguishable by the available settlement apparatus." (Michelman, supra, 80 Harv.L. Rev. at p. 1214; fns. omitted.)

and Real Property Acquisition Policies Act (42 U.S.C. § 4601 et seq.) and the interlocking[13/] California Relocation Assistance Act (Gov. Code, § 7260 et seq.) have made substantial strides in the direction of providing -- in the words of the declaration of policy of the federal act -- "fair and equitable treatment of persons displaced as a result of [public] programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." (42 U.S.C. § 4621.) Thus, provision is now made for the payment of moving and related expenses (42 U.S.C. § 4622; Gov. Code, §7262), acquisition of replacement housing (42 U.S.C. §§ 4623, 4624, 4626; Gov. Code, §§ 7263, 7263.5, 7264,

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13/ The federal act provides in substance that federal assistance for public projects is contingent upon the state providing payments as outlined in the federal act, and that the payments so made shall be included in the cost of the program for which federal assistance is available. (See 42 U.S.C. §§ 4630, 4631.)

7264.5), and advisory services (42 U.S.C. § 4625; Gov. Code, § 7261.) As to the matter of business relocation, the acts provide for in lieu payment (based upon average net earnings) of up to $10,000 in cases wherein the business cannot be relocated without substantial loss of patronage and is not a part of an enterprise having another establishment or establishments in the same or similar business which are not being acquired. (42 U.S.C. § 4622(c); Gov. Code § 7262, subd. (c).)[14/] (See generally 6A Nichols,

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14/ The federal act provides: "(c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall be not less than $2,500 nor more than $10,000. In the case of a business no payment shall be made under this subsection unless the head of the Federal agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial (Cont'd)

Eminent Domain, supra, ch. 34; Comment: Relocation Assistance in California: Legislative Response to the Federal Program (1972) 3 Pacific L.J. 114.)

14/ (Cont'd) enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term 'average annual net earnings' means one-half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the had of such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period."

The relevant provisions of the state act (Gov. Code, § 7262, subd. (c)) are similar in all pertinent respects.

The foregoing acts do not address themselves directly to the matter here before us, i.e., loss of business goodwill. However, it is clear that the provision for in lieu payments adverted to above represent an attempt to provide some compensation (up to the maximum of $10,000) for business losses occasioned through condemnation. 15/ More importantly, the recent action of the Legislature in enacting new section 1263.510 of the Code of Civil Procedure -- which section will in future cases provide compensation for loss of goodwill in coordination with applicable provisions of the

15/ This, like the other provisions of the respective relocation acts, is clearly an effort by the legislative arm of government to introduce what Professor Michelman would term a "relatively cheap form of settlement [designed to] reduce demoralization costs so effectively that, by using it, we can reduce the total of settlement plus demoralization costs below what they would be in the absence of any settlement." (See fn. 12, ante.)

Relocation Assistance Act16/ -- manifests an explicit legislative recognition of the problem and a willingness to address

16/ New section 1263.510, effective January 1, 1976, provides:

"(a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

"(1) The loss is caused by the taking of the property or the injury to the remainder.

"(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

"(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

"(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

"(b) Within the meaning of this article, 'goodwill' consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."

itself to it.[17/]

In view of all of the foregoing we have concluded that sound reasons of constitutional and judicial policy counsel against a present reinterpretation of constitutional "just compensation" clauses to require compensation for business goodwill affected or damaged by exercise of the power of eminent domain. The present discrete limits upon constitutionally compelled compensation, while seeming arbitrary and irrational from the point of view of total indemnification for losses sustained through condemnation, suffer from meither of those vices when viewed in the proper context of institutional functions and capabilities. The courts, in essentially limiting the scope of constitutionally compelled compensation to the fair market value of real property taken or damaged by public

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17/ Although, as we have observed at the outset of this opinion, the provisions of new section 1263.510 are not applicable to this proceeding, we believe it appropriate to make reference to them as a manifestation of continued legislative concern in this area.

projects, have in essence recognized their limitations in providing overall fair treatment for persons who suffer injuries as a result of public projects. The legislative branch of government, recognizing its peculiar competence in this area, has undertaken responsive steps and evidences a willingness to continue to deal with the difficult and involved questions of social policy which underlie the task. In these circumstances wisdom lies in the direction of judicial deference to the legislative branch. We therefore reaffirm the long-standing and uniform rule of constitutional interpretation which holds that the provisions of the state and federal Constitutions providing for the payment of just compensation upon the taking or damaging of private property for public use (see Fn. 2, ante) do not require that compensation be paid for the loss of business goodwill sustained due to the exercise of the power of eminent domain, and that recourse for recoupment of injury of this kind must lie with the legislative branch. We further hold that this rule is based upon sound considerations of governmental

policy and does not operate to deny affected parties the equal protection of the laws.

IV

As we have indicated above, defendant's attack upon the trial court's failure to include the loss of business goodwill is based not only upon his general challenge to the rule of noncompensability, which we have treated above, but also upon the particular facts of this case, as reflected in the trial court's findings. The substance of the applicable findings was (1) that due to his age and physical condition defendant Abrams was wholly incapable of relocating his business in a new area, and (2) that as a result the business goodwill of his pharmacy was taken, damaged, and destroyed by the taking of his real property. It is clear from what we have said above, however, that damage resulting to business goodwill due to the failure or inability of the condemnee, in his particular personal circumstances, to transfer that goodwill to another location, cannot form an element of the compensation required

by applicable constitutional provisions. Accordingly, the trial court was correct in denying compensation in this respect.

V

As we have pointed out above (part I, ante), the trial court in this case awarded compensation for the stipulated value ($10,000) of certain "ethical drugs" owned by defendant on the ground that condemnation had destroyed his market for these drugs. The drugs in question were in opened containers, and the trial court -- apparently reasoning that because defendant Abrams' physical condition rendered relocation of the business impossible, and because state law essentially forbids resale of "ethical drugs" in opened containers to another pharmacist without a certification of purity[18] (the cost of which would exceed the value

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18/ See California Administrative Code, title 16, section 1717(a). All pertinent evidence before the court indicated that upon discontinuation of his business defendant Abrams would be unable to dispose of his stock of "ethical drugs" to another pharmacist.

of the subject drugs) -- concluded as a matter of law as follows: "ABRAMS' ethical drugs in open containers, as his personal property, are compensable under Cal. Const. Art. 1, § 14 [now Cal. Const., art I, § 19 -- see fn. 2, ante] (Sutfin v. State (1968) 261 Cal.App.2d 50)."

Plaintiff challenges this determination on appeal. It urges that the "ethical drugs" in question -- i.e. those in opened containers -- are movable personal property not affixed to the realty and as such are non-compensable in an eminent domain proceeding brought to acquire a parcel of real property. (See 2 Nichols, Eminent Domain, supra, § 5.84, pp. 5-438 - 5-439; City of Los Angeles v. Allen's Grocery Co. (1968) 265 Cal.App.2d 274, 279.) It submits that the case of Sutfin v. State, supra, 261 Cal.App.2d 50, cited by the trial court in support of its conclusion, is readily distinguishable because that case -- an action in inverse condemnation for damage to automobiles inundated by flood waters resulting from a state highway project -- involved actual physical invasion of the

plaintiff's personal property and moreover did not concern public acquisition of real property through eminent domain. The universal rule and California rule, plaintiff insists, is that personal property not affixed to the realty cannot form an element of compensation under constitutional provisions assuring "just compensation" when the realty is taken through eminent domain; this rule, it is asserted, applies regardless of whether the subject personal property is rendered essentially valueless by condemnation of the realty.

Defendant offers strenuous arguments to the contrary, urging that Sutfin is controlling and that recent decisions in state and federal courts have undermined the reasoning upon which the so-called general rule rests -- at least in cases wherein condemnation has had the effect of rendering the subject personal property essentially valueless.

We believe that all of defendant's contentions in this respect may be answered by noting a fundamental distinction between this case and the Kimball Laundry

case to which we have made extensive reference in part III above. In Kimball Laundry, it will be recalled, the United States Supreme Court held that when the government by its act of condemnation rendered the condemnee's trade routes essentially valueless to it during the period of the temporary taking these involved, compensation was required because the specific nature of the condemnatory act involved (i.e., a temporary taking) in and of itself brought about the total devaluation in question.

In the instant case, on the other hand, the act of condemning the property upon which defendant conducted his business did not in and of itself result in the loss of value of which defendant complains. Rather, as we have pointed out above with respect to the matter of business goodwill, it was the personal circumstances of the condemnee himself -- specifically his age and physical condition -- which operated to prevent his transfer of his "ethical drugs" to a new location and his realization of their value at that new location. (See part IV, ante.) It was only this factor which

rendered significant the fact of legal limitations upon the sale of those drugs to another pharmacist. Thus, the expansion of the general rule which defendant seeks is not one based on the nature of the condemnatory act but upon its practical effect in particular personal circumstances. No case has been cited to us or has been found as a result of our study which would justify departure in this situation from the universal rule denying compensation for movable, nonaffixed personal property on condemned realty.[19/] We conclude that the award of compensation on a constitutional basis in this instance was inappropriate and erroneous.

Considerations similar to those expressed by us in part III above also

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19/ The so-called "constructive annexation" cases, such as City of Los Angeles v. Klinker (1933) 219 Cal. 198, and In Re Slum Clearance, City of Detroit (1952) 332 Mich. 485, are clearly distinguishable. There is no suggestion in this case that defendant's "ethical drugs" are so adapted for use on the condemned realty that they must be considered a part of it.

support our conclusion in this matter. The California Relocation Assistance Act, at section 7262 of the Government Code, makes specific provision for the award of statutory compensation in cases of this nature. Subdivision (a) of that section provides: "As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his: (1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property. (2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity. (3) Actual and reasonable expenses in searching for a replacement business or farm." (Italics added.)20/

20/ As noted above (see fn. 14, ante), subdivision (c) of section 7267 makes provision for an in lieu payment of up to $10,000 in certain circumstances.

Clearly the underscored language contemplates that an owner of a business on real property acquired for public use may elect either to move that business to a new location or to discontinue it entirely. When he chooses the latter alternative, as defendant Abrams has done in this case, and "actual direct losses of tangible personal property" result -- as they are alleged to have resulted in this case -- the statute provides for compensation up to "an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity. Clearly, in the case of discontinuance as opposed to moving, the "reasonable expenses that would have been required to relocate" are those which would be required in order to place the subject property in the hands of one who could utilize it after the owner's discontinuance of business. Here it was alleged, and the trial court apparently concluded, that those expenses would exceed the value of the "ethical drugs" themselves.

The presence of the foregoing statute,

in combination with the considerations of policy which we have discussed in part IV above, buttresses our conclusion that the trial court was in error when it held that the settled rule of constitutional interpretation (forbidding compensation for personal property not affixed to the condemned realty) should be relaxed in cases wherein condemnation has the practical result -- due to circumstances personal to the owner -- of diminishing the value to him of movable personal property located on the condemned premises. The Legislature has brought its special competence to this very area of incidental damage, and sound policy dictates that the courts refrain from setting up competing rules on a constitutional basis.

It might be thought, on the basis of the last paragraph but one, that we should affirm the judgment on this point in spite of the trial court's erroneous approach because the result to be reached under a proper interpretation of the Relocation Assistance Act is identical to that reached by the trial court. "No rule of decision is better or more firmly established by authority, nor one resting upon

a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329; see also Blank v. Borden (1974) 11 Cal.3d 963, 970, fn. 5; D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 18-19). However, we believe that in the instant case such a disposition would not be justified. Section 7262, subdivision (2)(2) of the Government Code clearly contemplates that the determination of the amount to be awarded for losses of tangible personal property as a result of discontinuance of business following condemnation is to be made, at least in the first instance, by the public entity. Moreover, the statute's provision for in lieu payments (see fns. 14 and 20, ante) contemplates an election by the condemnee; we would essentially foreclose that election if we were to affirm the judgment.

Finally, because this is not an action under the California Relocation Assistance Act but an action in eminent domain

brought pursuant to article I, section 19, of the state Constitution, a judgment which would amount to enforcement of the provisions of the act would be inappropriate. In view of all of the circumstances we believe that the judgment should be reversed in its entirety, with directions to the trial court to undertake further proceedings leading to a new judgment in eminent domain limited in accordance with the views expressed herein. Defendant may immediately proceed to avail himself of such relief and remedies as may be available to him under the California Relocation Assistance Act.

We do not intend to imply by anything we say in this opinion that we relinquish all constitutional supervision of actions undertaken by the legislative branch in affording "fair and equitable treatment of persons displaced as a result of [public] programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." (42 U.S.C. § 4621.) If at any time it should appear that legislative efforts in this area result

in the clear infringement of constitutional rights, the courts will necessarily discharge their historic and constitutional responsibilities. What we declare and hold is that constitutional "just compensation" clauses do not and by reason of institutional realities cannot be made to perform all conceivable functions in the area of providing fair treatment for persons who are deprived of their property for the public good. A substantial share of those functions, most notably those relating to incidental damages arising from a taking, must be performed by the governmental institution best designed and equipped to balance and consider the competing social policies here at work. That institution, the Legislature, has taken significant steps in this regard and manifests a continuing disposition to insure that the goal of fundamental fairness be achieved. The fact that the most recent statutory developments -- i.e., those contained in the 1974 act -- are by their terms applicable to the instant case cannot cause us to depart from what we consider to be sound judicial and constitutional policy.

To recapitulate, we hold (1) that under the law applicable to the case at bench, and in particular under pertinent constitutional provisions, defendant condemnee was not entitled to recover compensation either for loss of business good will or for the loss of value of his inventory of "ethical drugs," resulting from condemnation of the real property owned by him; (2) that accordingly the trial court did not err in concluding that he was not entitled to be compensated for loss of business goodwill; but (3) that the court did err in awarding him compensation for his inventory of ethical drugs. The judgment must therefore be reversed, but we find nothing in the record impelling us to order a new trial. The case was fully tried and we apprehend no necessity to take further evidence. On remand the court should make findings of fact and conclusions of law in conformity with the views herein expressed and enter judgment accordingly.

The judgment is reversed and the cause is remanded to the trial court to proceed with the disposition thereof under the

directions and in conformity with the views herein expressed. Defendant shall recover his costs on plaintiff's appeal; plaintiff shall recover its costs on defendant's appeal.

SULLIVAN, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
TOBRINER, J.
MOSK, J.
CLARK, J.
RICHARDSON, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, Plaintiff, Appellant and Respondent, vs. ARTHUR J. ABRAMS, Defendant, Respondent and Appellant.	2D CIVIL NO. 42058 Sup.Ct.No. 997 068

APPEALS from a judgment of the Superior Court of Los Angeles County. Robert W. Kenny, Judge. Reversed with directions.

Eugene B. Jacobs, Agency Counsel, Robert J. Hall and Oliver, Stoever & Laskin, Special Counsel, by Thomas W. Stoever and C. Edward Dilkes, for appellant Community Redevelopment Agency.

Fadem, Kanner, Berger & Stocker, a

professional corporation, by Gideon Kanner, for appellant Abrams.

Arthur Abrams has been a pharmacist in an area embraced by the Watts Redevelopment project. He was the owner in fee simple of the real property on which the pharmacy was located. At the time of the commencement of this action Mr. Abrams was 64 years of age and suffered from rheumatoid arthritis.

On February 24, 1971, the Community Redevelopment Agency of the City of Los Angeles (the Agency), in the course of implementing the Watts Redevelopment Plan, filed an action in eminent domain to acquire the real property on which Mr. Abrams' pharmacy was situated. This parcel was part of an area of approximately 20 square blocks falling under the sweep of the Agency's proposed condemnation. The total condemnation not only took Abrams' pharmacy but eliminated the neighborhood from which his clientele came.

By his answer Mr. Abrams specifically prayed that the value of two types of personal property should be included in any determination of "just compensation"

for the Agency's taking of his property. These two types of personal property were (1) a quantity of "ethical drugs"[1] which were in inventory on the premises, and (2) the business or "goodwill." He alleged that the value of the drugs was $60,000 and the value of the business or goodwill was $25,000.

In support of his contention Mr. Abrams alleged that because of State imposed restrictions on the sale of "ethical drugs" his stock thereof were rendered valueless by the elimination of his place of business and that because of his own particular situation and the circumstances of this particular "taking"[2] he is incapable of relocating his business.

The trial court, on the basis of substantial evidence, found that (1) by

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1. "Ethical Drugs" are those drugs which cannot be sold without a prescription.

2. It is claimed by Abrams and not denied by the Agency that the Watts Redevelopment plan contemplates that the area acquired by the Agency will eventually be turned over to private interests for the purpose of establishing various commercial enterprises which could include a drug store.

reason of his age and physical condition, Mr. Abrams in unemployable, and must rely for a livelihood on his own business, and for that reason his business constitutes his only present and potential source of livelihood, and his principal asset, and (2) Mr. Abrams is incapable of starting a new business located in a new area.

The evidence established that because of State requirements the inventory of ethical drugs could not be sold to another pharmacist without a certification as to purity. The cost of such testing and certification would exceed the value of the drugs. It was stipulated that the value of the drugs was $10,000.

As a result the trial court concluded that the good will of Mr. Abrams' business was "taken, damaged, and destroyed" and that the market for the drugs had been "destroyed" by the condemnation action.

On the basis of these findings and conclusions the trial court awarded Mr. Abrams $10,000, the stipulated value of the drugs, in addition to the value which the jury placed on the real property and

fixtures but denied any award for the goodwill of the business on the grounds that as a matter of law it was non-compensable. Both the Agency and Mr. Abrams have appealed.

Since on appeal we do not reweigh the evidence, our starting point is the well supported findings of the trial court that the two forms of personal property at issue were taken, damaged or destroyed by the condemnation action. Their value has been reduced to zero.

From this base we proceed to determine who should bear the loss. The essential question to be answered is whether a failure to compensate for these items would result in the owner of private property being asked to bear a disproportionate share of the cost of a public improvement. (Clement v. State Reclamation Board, 35 Cal.2d 628.)

On this appeal the Agency Suggests an issue which was not raised below,[3/]

3/ During pretrial proceedings the Agency's position was that compensability per se of the contested items of personal property was at issue. It did not challenge Abrams' claim of inability

that is that Mr. Abrams did not mitigate the damages. This claim is based on two different notions.

As to the inventory of drugs the Agency contends that Mr. Abrams made no effort to dispose of the drugs but instead continued to keep his inventory current. The agency did not seek an order for immediate possession, hence Mr. Abrams continued in business until conclusion of the trial. It appears that he conducted that business with its inventory at normal levels.

Administrative Code section 1710 requires the owner of a pharmacy to maintain an adequate supply of drugs and chemicals. Be that as it may, the Agency

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3/ (Cont'd) to relocate the business or dispose of the ethical drugs.

The final pretrial order states as follows: "Plaintiff and defendant can now stipulate and agree that the legal issue is as follows: Whether on the facts at bar, defendant A.J. ABRAMS is entitled to be compensated for business good will, if any, and his stock of ethical drugs, if any, pursuant to Article I, §14 of the California Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution."

is really suggesting that we reweigh the evidence since the trial court found that Mr. Abrams could not otherwise dispose of the drugs he had on hand. Mr. Abrams was not required, prior to judgment, to allow his business to atrophy.

Concerning the loss of the business the Agency contends that Mr. Abrams should have availed himself of certain relocation assistance afforded by provisions of the Government Code.

Government Code section 7262 provides that as a cost of the acquisition of real property for a public use, a public entity shall compensate a displaced person for (1) expense of moving the business, (2) expense in searching for a replacement of the business, (3) actual direct loss of tengible personal property as a result of moving or discontinuing a business.

In lieu of such compensation a business man who is displaced by a condemnation action may elect to accept a lump sum payment based on annual average net earnings not to exceed $10,000. This latter option is conditioned on the <u>public agency</u> being satisfied that the business

cannot be relocated without substantial loss of patronage.

This statute appears to us to be legislative recognition of the need to compensate for loss of business as a result of a condemnation action but contemplates that such compensation be independent of the condemnation proceedings. The relocation assistance contains a certain amount of "hedging" by the Legislature in giving the Agency the fact-finding power on the issue of relocability and in limiting absolutely the amount of compensation available.

Further, section 7270 of the Government Code provides that nothing in these provisions shall be construed as creating in any condemnation proceedings any element of damages not in existence on the date of the enactment. Section 7274 specifically provides that these provisions create no rights or liabilities. Thus these provisions are not an adequate substitute for the constitutional requirement of just compensation.

We discuss the Legislature's power to limit compensation infra. At this point

for the reasons stated and because the issue was not raised at trial we reject the Agency's contention that Mr. Abrams failed to mitigate damages.

The remaining contention of the Agency is essentially that personal property is, as a matter of law, non-compensable in an action for condemnation of real property.

Article I, section 14 of the California Constitution provides that "Private property shall not be taken or damaged for public use without just compensation. ..." That very simple statement of one of the most fundamental tenets of our tradition and culture has resulted in volumes of case law and text material dealing, under varying circumstances, with the issues of what has been "taken or damaged" and what are the ingredients of "just compensation."

The Constitution refers to "property" without distinction as to its character as real or personal. (See Sutfin v. State of California, 261 Cal.App.2d 50, where in an inverse condemnation action it was held that plaintiff could be compensated for damage to a number of automobiles

on plaintiff's property caused by flooding from state flood control works.) Contrary to the Agency's contention here, if the state takes or damages personal property in the exercise of its power of eminent domain it is obligated to pay just compensation to the owner. (Sutfin, supra; also see Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stanford L.Rev. 727; 1 Nichols, The Law of Eminent Domain (rev. 3d ed. 1973) §1.13[3], pp. 1-18.) We see no difference between the damaging of automobiles in Sutfin and the destruction of the personal property here.

In determining whether property, real or personal, has been taken or damaged the test is the loss to the owner and not benefit to the taker. (People v. La Macchia, 41 Cal.2d 738; U.S. v. General Motors Corp., 323 U.S. 373.)

Thus in the case at bench it matters not that the Agency does not intend to operate a drug store on the premises or make use of Abrams' inventory or business. (Boston Chamber of Commerce v. Boston, 217 U.S. 189; United States v. Fuller, 409 U.S. 488; Almota Farmers Elevator

& Whse. Co. v. U.S., 409 U.S. 470.)

The fundamental issues for the courts in these cases are simply whether a property right has been taken or damages and the value of that private property right as of the time of the taking or damaging. Just compensation means the full and perfect equivalent in money of the property taken or damaged. Its owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken or damaged. (United States v. Miller, 317 U.S. 369, 373.)

The determination of these issues is purely a judicial function and that function cannot be circumscribed by the Legislature. When the state through its executive arm takes or damages private property it cannot through its legislative arm limit the price it will pay or the manner of its payment. (Monongahela Navigation Co. v. United States, 148 U.S. 312; United States v. New River Collieries, 262 U.S. 341; Beals v. City of Los Angeles, 23 Cal.2d 381; County of Los Angeles v. Ortiz, 6 Cal.3d 141.)

The law in California and elsewhere

has long recognized compensable consequential damage to property rights which, while not actually "taken", are damaged or destroyed by the physical appropriation of a portion of the owner's property. (See People v. Giumarra Vineyards Corp., 245 Cal.App.2d 309; Southern Calif. Edison Co. v. Railroad Com., 6 Cal.2d 737; 4A Nichols, Eminent Domain, § 14.1.) There seems to be no logical reason why that principle should not apply with equal force where, in condemning real property, personal property, though not "taken", is damaged or destroyed.

Of course, if personal property which is located on the real property can simply be picked up and moved without loss to the property owner then the condemning agency takes and pays for only the land and fixtures. In the latter situation the condemning agency has not taken or damaged the personal property. But that is not the same as saying that such personal property is never compensable when it has been taken or damaged as a result of condemning the underlying real property.

Where the removal or relocation of either tangible or intengible personal

property, under the circumstances of the particular case, is impossible, then the owner's just compensation should not be limited by an arbitrary notion that in eminent domain any particular form of recognized property right is non-compensable.

"This is so because, as was said in People v. Superior Court, 145 Cal.App.2d 683, 690, hearing denied, the constitutional concept of just compensation expresses a principle of fairness. If any compensable constituent element of value, ... is omitted in arriving at just compensation this constitutional mandate has not been met. [Citations.] Every rule of condemnation law, be it statutory or decisional, for determining the value of land taken in condemnation, must in its every application conform to this constitutional mandate. [Citations.]" (People Ex Rel. Dept. Pub. Wks. v. Lynbar, Inc., 253 Cal.App.2d 870, at 883.)

The Agency relies heavily on City of Los Angeles v. Allen's Grocery Co., 265 Cal.App.2d 274, where it was stated ". . . the taking of real estate does not

affect the ownership of personal property kept on the premises taken, but not permanently affixed thereto. The owner of the personal property is entitled to remove said personal property, and evidence of the value of the unsold and removed stock in trade retained ... is not a proper element of damage under the circumstances." (Page 279.) (Emphasis added.)

The circumstances in the Allen case were that real property upon which a grocery store was located was being condemned. The owner sought compensation for his inventory of grocery items, however, there was nothing in the Allen case to indicate that the grocery items were in any way different than the usual inventory of a grocery store nor was there any special problem in removal and resale. This is markedly different from the situation of Mr. Abrams' inventory of ethical drugs. Since the state itself through its regulation of the transfer of these drugs made the transfer impossible it may not be heard to say that Mr. Abrams could or should have somehow disposed of them.

We turn now to the issue of whether Abrams should be compensated for the loss of his business. Of course the good will of a business is property and recognized as compensable in both contract and tort actions between private litigants. (Civ. Code, §§ 654, 655; Bus. & Prof. Code, § 14102; Carrey v. Boyes Hot Springs Resort, Inc., 245 Cal.App.2d 618.) It is recognized as community property in cases of dissolution of marriage. (Golden v. Golden, 270 Cal.App.2d 401; In re Marriage of Fortier, 34 Cal.App.3d 384.)

The California Supreme Court in Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, held that Code of Civil Procedure section 1248 limited compensation to the value of the property taken and/or severance damages accruing to property not condemned. Thus the court declared that damage to business situated on the condemned real estate was not recognized by the statute as an element of compensation.

The court in Oakland, supra, at p. 398, stated: "It is quite within the power of the Legislature to declare that a damage to that form of property known

as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is damnum absque injuria, and does not form an element of the compensating damages to be awarded." (Emphasis added.)

This rule enunciated in 1915 has been widely criticized. (20 Hastings Law Journal, p. 675, The Unsoundness of California's Noncompensability Rule as Applied to Business Losses In Condemnation Cases; 67 Yale Law Journal, pp. 62-74, Eminent Domain Valuations in an Age of Redevelopment.)

The Oakland court itself took the pains to state that it did not wish to be understood as saying that the rule should not be otherwise.

The California Law Revision Commission, as recently as January of 1974, at page 45, of its tentative recommendations relating to condemnation law and procedure pointed out that eminent domain frequently works a severe hardship on

owners of businesses affected by public projects and recommends that steps be taken to compensate for the loss of goodwill of business that has been taken or damaged.

There has been considerable development in the law since the Oakland decision. Of course, the Constitution still does not say that a property right in a business is compensable. On the other hand, the Constitution does not say that it is not compensable, and it is now well established that since the mandate for payment of just compensation comes from the Constitution itself, the courts need not await legislative authorization in order to determine the ingredients of such compensation.

The private ownership of property is fundamental to our system of government and its protection against governmental intrusion is constitutionally guaranteed, hence the requirement that the government pay for its taking should be liberally construed in favor of the property owner. An arm's length bargain-seeking posture on behalf of a condemning agency in

dealing with a property owner is really contrary to the spirit of our Constitution.

"The Constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, [citations] as it does from technical concepts of property law." (United States v. Fuller, supra, 409 U.S. 488, at 490.)

In 1936, Oakland v. Pacific Coast Lumber, etc. Co., supra, 171 Cal. 392, was distinguished and found inapplicable in Southern Calif. Edison Co. v. Railroad Com., 6 Ca.2d 737. The City of Tulare intending to operate its own municipal electrical system condemned Edison transmission lines which had previously served electrical consumers within the City of Tulare. The Supreme Court approved an award of severance damages to Edison based upon a reasonable return on capital investment, and rejected the condemnor's contention that, based on Oakland v. Pacific Coast Lumber, etc. Co., no damages for interference with business should be allowed. The distinction which the court found to exist was in a 1917

amendment to the Public Utilities Act providing for severance damages, stating "The deficiency in the law in 1915 (the time of the Oakland decision) was thus supplied in 1917 and the contention of the city is no longer available." (Southern Calif. Edison Co. v. Railroad Co., at pages 750-751.)

Another distinction which is sometimes advanced as a reason for denying compensation for goodwill of a business was that in Edison the condemnor intended to operate the business, while in Oakland the condemnor did not so intend or desire. This distinction loses its significance in light of the "loss to owner" test of La Macchia, U.S. v. General Motors and U.S. v. Fuller, supra, and the Oakland decision in light of Edison as well as those cases appears to have lost some of its vitality. At least it does not appear to stand as an insurmountable barrier to compensation in hardship cases such as the one at bar.

Furthermore, since there are many readily available formulae for evaluating the worth of a business (see In re

Marriage of Fortier and Southern Calif. Edison Co. v. Railroad Com., supra) it cannot be earnestly suggested that compensation should be denied on the basis that it is too speculative or difficult to ascertain.

The most recent and persuasive language pointing to an abandonment of the former rigid rule is to be found in Klopping v. City of Whittier, 8 Cal.3d 39, where our Supreme Court in an inverse condemnation action approved compensation for loss of rental income occasioned by an announcement of future condemnation action.

The court in Klopping quoted with approval the following at pages 53-54, from a decision of the Wisconsin Supreme Court in Luber v. Milwaukee County, 177 N.W.2d 380:

"The importance for allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the

former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact that people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken. ... The rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded. ..." (Emphasis added.)

In State v. Saugen, 169 N.W.2d 37, the Supreme Court of Minnesota also discarded the rule that consequential damages are damnum absque injuria by holding that

where a condemnee is unable to transfer his business from the condemned real property to a new location the loss of the business is compensable.

Following the lead of Minnesota and Wisconsin, the California Supreme Court has pointed the way toward a more logical approach and to eliminating hardship in these types of cases. We follow along that path by affording Mr. Abrams the relief for which the circumstances here cry out.

The judgment is reversed and the matter is remanded to the trial court for the sole purpose of determining the value of the business that was destroyed by the condemnation. When that value is determined it shall be added to the judgment.

Defendant Abrams to recover costs on both appeals.

CERTIFIED FOR PUBLICATION

COMPTON, J.

I concur:

BEACH, J.

DISSENT

I dissent.

In my view the trial court correctly determined that business goodwill is not a compensable item of damages in the condemnation of real property for public use. The Supreme Court of California has consistently held such damages noncompensable, (Oakland v. Pacific Coast Lumber etc. Co.(1915) 171 Cal. 392, 398-399; People v. Ricciardi (1943) 23 Cal.2d 390, 396; People v. Ayon (1960) 54 Cal.2d 217, 226; Breidert v.Southern Pac. Co. (1964) 61 Cal.2d 659, 667), and the California Legislature has repeatedly rejected attempts to make business goodwill a generally compensable item in condemnation proceedings.

The Federal Constitution does not require that such forms of intangible property as contingent rights, future interests, privileges, servitudes, expectancies, permits, and licenses be made compensable in eminent domain. (Mitchell v. United States (1925) 267 U.S. 341, 345 (Brandeis, J.); U.S. ex

rel. T.V.A. v. Powelson (1943) 319 U.S. 266, 283-284 (Douglas, J.); United States v. Fuller (1973) 409 U.S. 488, 493-494 (Rehnquist, J.).) Business goodwill is merely a shorthand term for expectation of future business profits. (Bell v. Ellis, 33 Cal. 620, 625.) The extent of compensation for such expectancies has been left to the good judgment of the Congress and the state legislatures, bodies well-equipped to evaluate to what extent such speculative interests should be compensated in the condemnation of real property for public use.

In California the line between compensable and noncompensable property has been consistently drawn to exclude business goodwill as a generally compensable item of danges. While in certain cases a forceful argument can be made for the inclusion of business goodwill as a compensable item, in others it can be argued with equal force that future business profits, that is to say business goodwill, are inherently speculative and should be excluded as items of cost in the acquisition of real property for public use. A measured and temperate evaluation of the extent to which such

expectancies should be recognized in eminent domain is particularly needed today when a myriad of environmental problems presses upon us, including protection of coastline, preservation of scenic areas, slum clearance, purification of urban atmosphere, rectification of surface waters, mass transit, urban renewal (as at bench), and reformation of suburban sprawl, each accompanied by its inseparable auxiliary of limited available means to achieve unlimited ends. In the equation between private expectancies and public use a balance must be struck which will allow the private owner adequate compensation for what he has irretrievably and categorically lost and at the same time permit the public to move against critical environmental problems without being saddled with exorbitant costs that could foreclose effective action. The need for reasonable accommodation between private expectancies and the public interest may be seen from the facts of such cases as California v. Superior Court (Veta Co.), __ Cal.3d ___, filed August 2, 1974 (coastal preservation); Candlestick Properties, Inc. v. San

Francisco Bay Conservation Etc. Com., 11 Cal.App.3d 557 (tidelands preservation); Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110 (compulsory dedication for public use); Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247 (controlled use of private property); Gion v. City of Santa Cruz, 2 Cal.3d 29 (prescriptive rights in shoreline).

In this equilibrium between private expectancy and public outgo, business goodwill is a critical factor, for its monetary value may be inflated to whopping amounts.[1/] The degree of

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1/ Unlimited acceptance of future business profits as a compensable item of damages in eminent domain could multiply the costs of public improvements many-fold. Compare, for example, the value of the real property condemned with the amounts sought for loss of future business profits in the following cases:

Cases	Real Estate	Future Business Profits Claimed
Oakland v. Pacific Coast Lumber, etc. Co., 171 Cal. 392, 397	$49,000	$304,000

(Continued)

recognition to be given in condemnation proceedings to such open-ended claims presents a problem that has always been considered in California a matter for legislative solution. (Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 398.) The same is true elsewhere, for in the absence of statute general compensation for business goodwill has been consistently denied. (U.S. v. General Motors Corp. 1945) 323 U.S. 373, 377-380; Nichols on Eminent Domain (3d ed.) §§5.76, 13.3, 13.3[2], 13.31, 13.31[1].) The Community Redevelopment Agency's brief asserts that only two states, Vermont and Florida, compensate for loss of general business goodwill in condemnation, and both of these do so by statute. A third

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1/ (Cont'd.)

Mitchell v. United States, 267 U.S. 341, 343	76,000	100.000
U.S. ex rel. T.V.A. v. Powelson, 319 U.S. 266. 275	976,000	6,524,000

state, Pennsylvania, formerly compensated by statute for business goodwill, but repealed its law in 1971.

The California Legislature has not been oblivious to the difficulties encountered by persons displaced by condemnation of real property for public improvements, and in the Relocation Assistance Act it provided, among alternative benefits, compensation up to $10,000 for a displaced person who has discontinued a business that cannot be relocated (Gov. Code, §§ 7260, 7262(c); see also the federal Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601, 4622(c).) Even now, the Legislature is reviewing the entire field of eminent domain, including compensation for loss of business goodwill, and it has before it the recommendation of the California Law Revision Commission that loss of business goodwill be made compensable to the extent the loss is not preventable and not compensated for elsewhere. ("Tentative Recommendation Relating to Condemnation Law and Procedure," Jan. 1974.) Whether the Legislature will

accept or reject the tentative recommendation of the Law Revision Commission on business goodwill, or adopt it with limitations on maximum amounts payable, I have no way of knowing. But I do know that compensability of business goodwill involves a legislative decision which affects basic fiscal policy and requires evaluation of other competing interests seeking recognition from the public purse. In view of the long state history consistently holding that compensation for loss of business goodwill involves a legislative determination, I think it inappropriate for this court to preempt a basic legislative function under the guise of constitutional decision and impose upon the state a policy of unlimited, unrestricted compensation for loss of future business profits, a policy that would remain frozen against any change short of constitutional amendment.

Required here is a legislative scalpel, not a constitutional meat ax. (Cf. Michelman, Property, Utility, and Fairness: Comments On The Ethical Foundations Of "Just Compensation" Law,

80 Harv.L.Rev. 1165, 1253-1256 (1967).)
The Legislature still remains our best-equipped agency of government to wrestle with hard, intractible problems and arrive at workable solutions which will bring about an acceptable equilibrium among competing interests.

I would affirm the judgment.

FLEMING , Acting P.J.

APPENDIX C

Constitutional & Statutory Provisions

U. S. Constitution, Fifth Amendment

". . . nor shall private property be taken for public use, without just compensation."

U. S. Constitution, Fourteenth Amendment

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitition, Art. 1, §19.

"Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and

prompt release to the owner of money determined by the court to be the probable amount of just compensation."

California Constitution, Art. 13, §1.

"Unless otherwise provided by this Constitution or the laws of the United States:

(a) All property is taxable and shall be assessed at the same percentage of fair market value. When a value standard other than fair market value is prescribed by this Constitution or by s atute authorized by this Constitution, the same percentage shall be applied to determine the assessed value. The value to which the percentage is applied, whether it be the fair market value or not, shall be known for property tax purposes as the full value.

(b) All property so assessed shall be taxed in proportion to its full value."

California Constitution, Art. 13, §2.

"The Legislature may provide for property taxation of all forms of tangible personal property, shares of capital stock, evidences of indebtedness, and any legal or equitable interest therein nor exempt under any other provision of this article. The Legislature, two-thirds of the membership of each house concurring, may classify such personal property for differential taxation or for exemption. The tax on any interest in notes, deventures, shares of capital stock bonds, solvent credits, deeds of trust, or mortgages shall not exceed four-tenths of one percent of full value, and the tax per dollar of full value shall not be higher on personal property than on real property in the same taxing jurisdiction."

California Civil Code §654.

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may [be] ownership is called property."

California Civil Code §655.

"There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the goodwill of a business, trademarks and signs, and of rights created or granted by statute."

California Business and Professions Code §14102.

"The good will of a business is property and is transferable."

California Government Code §7262

"(a) As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a cisplaced person for his:

. . .

(2) Actual direct losses of tangible personal property as a result of moving or ciscontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity."

California Government Code §7267

"In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, be guided by the provisions of Sections 7267.1 to 7267.7, inclusive, except that the provisions of subdivision (b) of Section 7267.1 and Section 7267.2 shall not apply to the acquisition of any easement, right-of-way, covenant, or other nonpossessory interest in real property to be acquired for the construction, reconstruction, alteration, enlargement, maintenance, renewal, repair, or replacement of subsurface sewers, waterlines or appurtenances, drains, septic tanks, or storm water drains."

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IN THE

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Petitioner,

vs.

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Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

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I

The Economic Expectancy Known as Business Goodwill Does Not Ipso Facto Become Compensable Under the Fourteenth Amendment to the United States Constitution Simply Because the State of California Defines That Expectancy as "Property" for Specified Purposes, but Not as a Compensable Item When Incidentally or Consequentially Lost When Real Property Is Acquired Through the Exercise of the Power of Eminent Domain.

The principal thrust of Petitioner's argument rests upon the erroneous premise that if State law defines an economic expectancy, in this case business goodwill, as "property" for specified purposes (*e.g. California Business and Professions Code* §14102) ". . . that confers upon that right the status of 'property'

in a *constitutional sense*." (Petition, p. 15.) Petitioner relies upon *United States v. Willow River Power Co.* (1945), 324 U.S. 499, 502-503.

The fallacy in this argument is that the incidental or consequential loss of business goodwill has never at any time applicable to the case at bench been recognized in the State of California as compensable "property" in the constitutional sense when real property upon which a business is conducted is acquired for public purposes under the power of eminent domain.

Sixty years ago the Supreme Court of California speaking to this issue in *Oakland v. Pacific Coast Lumber, etc. Co.* (1915), 171 Cal. 392, 398, stated:

> ". . . [T]he real contention of appellant . . . [is] that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law. It is quite within the power of the legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or an inconvenience to a business is *damnum absque injuria*, and does not form an element of the compensating damages to be awarded." *Oakland v. Pacific Coast Lumber, etc. Co.* (1915), 171 Cal. 392, 398.[1]

[1]In 1975, the California Legislature adopted and the Governor signed into law a comprehensive Eminent Domain Law which, under limited circumstances, provides for the compensation for goodwill lost as the incident to the acquisition of real property upon which a business is conducted. This new law does not become operative until July 1, 1976 and is not, therefore, applicable to the case at bench. (California Statutes 1975, ch. 1275, p. ....., Section 2, operative July 1, 1976.)

This rule was reaffirmed in the instant opinion as to which petitioner seeks review, and generally speaking, is the rule which applies in all other jurisdictions. See 4 Nichols, *Eminent Domain* (3d ed. 1974), Section 13.3, pages 13-148.2-13.165; 1 Orgel, *Valuation Under The Law of Eminent Domain* (2d ed. 1953), Sections 1, 66-77, pages 1-11, 303-334.

Petitioner perpetuates this fallacious argument by contending that if an economic interest is declared "property" for all purposes, it is illogical and "semantic legerdemain" to deny compensation for the loss of impairment thereof in the exercise of eminent domain. (Petition at pp. 16-17.) Apart from pointing out that goodwill is defined as "property" for specified purposes and that it may be the subject of taxation under California law, Petitioner wholly fails to establish that goodwill is considered "property" for *all purposes*. Petitioner's contention simply begs the question.

The foregoing contention was definitively answered by this Court, speaking through Justice Douglas for the majority in *United States ex rel. T.V.A. v. Powelson* (1943), 319 U.S. 266, as follows:

> ". . . There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for

the property taken (citations omitted), *not all losses suffered by the owner are compensable under the Fifth Amendment*. In absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, *Valuation Under Eminent Domain* (1936), §71, §73. . . . That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not taken in the *Mitchell* case it need not be reflected in the award due the landowner unless Congress so provides." (319 U.S. at 281-283; Emphasis added.)

California law, in accord with the United States Supreme Court decision in *Powelson,* does not find that all "property interests" are compensable in eminent domain and that property for taxation purposes is entirely different from interests which are compensable in eminent domain. In *Placer County Water Agency v. Jonas,* 275 Cal. App. 2d 691, the Court stated at page 698:

"The fact that title 18 of the Administrative Code, section 126, classifies for purpose of state tax assessment certain grazing rights on publicly owned land as 'a taxable possessory interest' is of no consequence in solving the problem before us. The concept of 'property interests' for taxation purposes is entirely different from that of compensable interests in eminent domain.

In *San Pedro etc. R.R. Co. v. Los Angeles* (1919) 180 Cal. 18, 23 [179 P. 393], the court

pointed out that '"[t]he principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right against the state or government owning the land, has long been settled in this state. [Citations.] . . ."' The opinion further states that 'a bare possession by the sufferance of the real owner is subject to taxation where the estate of the real owner is exempt because the state or the United States is such real owner. . . .' (P. 25.)

While Jonas' interest in the public lands, such as it is, may be subject to taxation by the state, the authorities hereinbefore set forth conclusively establish that in an eminent domain proceeding such interest is not compensable. (See also *People* ex rel. *Dept. Public Works v. DiTomaso* (1967) 248 Cal.App.2d 741, 750-751 [57 Cal.Rptr. 293], citing with approval the determination in *People* ex rel. *Dept. Pub. Works v. Lundy, supra,* 238 Cal.App.2d at p. 358, that '"[l]icenses . . . are not proper subjects of condemnation."')"

II

The State of California Does Not Tax Business Goodwill Per Se.

The State of California does not now have nor has it ever had a property tax on business goodwill *per se*. Petitioner herein has never paid such a tax on the goodwill of his pharmacy business.

The California decisions cited by petitioner on page 18, footnote 10, of the petition for the proposition

that business goodwill is fully taxable as "property" *did not* involve goodwill. *Bank of California v. San Francisco* (1904), 142 Cal. 276, 75 Pac. 832 and *Miller and Lux v. Richardson* (1920), 182 Cal. 115, 187 Pac. 411, were primarily concerned with ad valorem taxation of *corporate franchises.* (Corporate franchises are taxable under Article XIII, Section 27 (formerly Article XIII, Section 16).) Petitioner cites no California decision involving the taxation of goodwill *per se,* under *Cal. Rev. and Tax. Code* §201.[2]

Business goodwill is clearly an intangible property interest, and as to such intangibles the California Supreme Court in *Roehm v. County of Orange* (1948), 32 Cal. 2d 280, 196 P. 2d 550, declared that as such it is not taxable. *Roehm* involved the Orange County Assessor's attempt to tax a liquor license, and the owner of the liquor license claimed that it, along with other intangibles such as "the goodwill of businesses", are not taxable. The California Supreme Court agreed that under Article XIII, Section 1, and all other constitutional statutory provisions, such intangibles were not taxable. At most, goodwill would be an increment to the value of property otherwise taxable, but not a taxable item in and of itself. Significantly, petitioner, in advancing the "taxation" argument, does not enlighten this Court as to how, if at all, the tax assessor has been treating the goodwill value of petitioner's drugstore business in computing petitioner's ad valorem real and personal property tax liability during the years prior to condemnation.

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[2]*Cal. Rev. and Tax. Code* §201 does not expressly designate goodwill, but provides: "All property in this State, not exempt under the laws of the United States or of this State is subject to taxation under this code."

III

The Doctrine of "Fairness" Has Never Been Stretched to Provide for Full Indemnification for All Losses Incidentally or Consequentially Sustained Through Condemnation of Real Property.

The quotation by Petitioner on pages 28-29 of the concluding language of this Court in *Armstrong v. United States* (1960), 364 U.S. 40, 49, must be read in the context of the facts in that case. In *Armstrong,* the Fifth Amendment issue was whether the Government's action in compelling a defaulting shipbuilder to transfer title to uncompleted boats and materials constituted a "taking" of materialmen's liens which had attached against the boats prior to the vesting of title in the Government. This Court held that there was a taking of the liens which entitled the materialmen to just compensation. The rationale of the Court was that the "Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done." (364 U.S. at 48.)

It is respectfully submitted that there is no constitutional compulsion to extend the rationale of *Armstrong* or, indeed, the "disproportionate burden" rationale to petitioner's case. The condemnor's act of "taking" in the case at bench did not extend to an irrevocable, *in rem* appropriation of Mr. Abrams' goodwill. Surely, the Agency in the case at bench cannot be said to have "taken" petitioner's intangible goodwill for its own advantage, as the Government "took" the tangible hulls and materials in *Armstrong.* The reality in the case at bench is that the loss of petitioner's goodwill was due, as the California Supreme Court recognized,

to Mr. Abrams' personal physical inability to transfer his business goodwill to another location. (15 Cal. 3d at 825, 832.)

In eminent domain cases reaching this Court in which similar "fairness" arguments were advanced in support of an expanded rule of compensation, the Court has repeatedly held that the Fifth Amendment does not require, on the actual taking of a property interest, payment for mere expectancies of profit, or for the frustration of contractual rights which pertain to the land, but which are not *specifically taken*. See, *e.g., United States ex rel. T.V.A. v. Powelson* (1943), 319 U.S. 266, 283-284 [loss of a business prospect based on an unexercised power of eminent domain]; *Mitchell v. United States* (1925), 267 U.S. 349 [destruction of condemnee's business resulting from taking of his land for the project and business could not be established elsewhere]; *Omnia Comm'l Co. v. United States* (1923), 261 U.S. 513 [frustration of contractual right resulting from Government requisitioning of steel plate production; *held,* a consequential injury, not a taking]. *Cf. United States v. Fuller* (1973), 409 U.S. 488 [Fifth Amendment does not require the Government to pay for increment of value based on use of condemned lands in conjunction with the Government's lands].

The case at bench is quite similar to *Mitchell v. U.S.* (1925), 267 U.S. 349, 69 L.Ed. 645. In *Mitchell,* the property owner claimed under the Fifth Amendment recovery for his loss of business. The property owner's land was especially adapted to the growing of a particular quality of corn, and the land was taken by the United States through eminent domain. As is the case at bar, the owner in *Mitchell* was unable to

reestablish himself in the same business. Again, as in the case at bar, the Government in *Mitchell* was taking the owner's property for a use totally unrelated to its existing use. The owner's claim for loss of business under the Fifth Amendment was denied on the ground that such business loss was only incidental to the acquisition of the real property and was, therefore, not compensable. *Mitchell v. U.S.* (1924), 217 U.S. 341 at 345.

This is the same rule in California. The California Supreme Court in the *Abrams* decision quoted the rule established in *Oakland v. Pacific Coast Lumber Co.* (1915), 171 Cal. 392 at page 398, 153 Pac. 705, that:

> "It is quite within the power of the legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria,* and does not form an element of the compensating damages to be awarded."

IV

The California Supreme Court Correctly Applied the Rationale of the Kimball Laundry Decision to the Facts of the Case at Bench.

The California Supreme Court decision summarizes its analysis of the *Kimball Laundry* decision as follows:

> "We learn from the foregoing (*Kimball Laundry* decision) that the rule denying compensation for business goodwill, far from being 'shot through' with exceptions, is uniformly applied in all cases

to which it is applicable—i.e., in all cases wherein the condemnor takes the fee upon which a business is conducted and does not *by the nature of its action* wholly preclude the condemnee from transferring its going-concern or goodwill value to another location. We also learn that this rule is based on the conviction that it is 'fair on the whole' to treat all such condemnees alike, refusing to create distinctions on the basis of 'the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value." (*Kimball, supra,* at p. 15; Petition, p. A-26.)

It is respectfully submitted that, contrary to Petitioner's argument at page 30 of his Petition, the *Kimball Laundry* decision and the California Supreme Court decision in *Abrams* deal with both the nature and the effect of the "taking".

With respect to both the nature and effect of the temporary taking of the laundry plant in *Kimball,* this Court held (338 U.S. at 16), "We conclude, therefore, that since the Government for the period of its occupancy of Petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had. . . ." In essence, the inevitable effect of the Government's temporary taking in *Kimball* was to appropriate the trade routes. In the case at bench, however, the loss of Petitioner Abrams' goodwill was not the inevitable effect of the Agency's taking. Even with the taking of 20 square blocks for the Redevelopment Project, had Mr. Abrams been a younger man and physically able, he surely could have started a new business elsewhere and perhaps even reestablished

his business in the subject area following redevelopment of a new business district. Mr. Abrams' unfortunate personal age and physical condition merely underscores that his predicament would have been the same, *i.e.,* inability to relocate whether the Agency condemned 20 square blocks or 1 block.

The California Supreme Court correctly stated in the *Abrams* decision:

> "It is clear . . . that damage resulting to business goodwill due to the failure or inability of the *condemnee, in his particular personal circumstances,* to transfer that goodwill to another location, cannot form an element of the compensation required by applicable Constitutional provisions. . . ." (Emphasis added; Petition, pp. A-46-47.)

V

Petitioner's Attack on Relocation Benefits Afforded Under California Government Code Section 7262 Is Based Upon a Misinterpretation of That Code Provision.

California Government Code Section 7262 affords a displaced business operator with a clear election.[3] Section 7262(a)(1) provides for the reimbursement of actual and reasonable moving expenses. Section 7262 (a)(2) provides for payment of the actual direct losses of tangible personal property resulting from the relocation of a business, but not to exceed the cost of moving said tangible personal property. Section 7262 (c), which is a separate and distinct compensation benefit, provides for an "in lieu" fixed relocation payment to a displaced person. Said fixed payment, based

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[3]California Government Code Section 7262 is set forth in its entirety in the Appendix.

on average annual net earnings of the business, may not be less than $2,500 and may be a maximum of $10,000. The "in lieu" payment provided for in Government Code Section 7262(c) is not limited by the costs of moving as contended by Petitioner.

In essence, Petitioner has confused and combined two separate and distinct compensation provisions for displaced business operators. (Petition, Point 3, pp. 25-26.)

Conclusion.

Respondent, The Community Redevelopment Agency of the City of Los Angeles, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

§ 7262. Expenses and Losses for Which Displaced Person Entitled to Compensation.

(a) As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his:

(1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property.

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity.

(3) Actual and reasonable expenses in searching for a replacement business or farm.

(b) Any displaced person who moves from a dwelling who elects to accept payments authorized by this subdivision in lieu of the payments authorized by subdivision (a) shall receive a moving expense allowance, determined according to a schedule established by the public entity, not to exceed three hundred dollars ($300), and in addition a dislocation allowance of two hundred dollars ($200).

(c) Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this subdivision in lieu of the payment authorized by subdivision (a), shall receive a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall

not be less than two thousand five hundred dollars ($2,500) nor more than ten thousand dollars ($10,000). In the case of a business, no payment shall be made under this subdivision, unless the public entity is satisfied that the business cannot be relocated without a substantial loss of patronage and is not a part of a commercial enterprise having at least one other establishment not being acquired, which is engaged in the same or similar business. For purposes of this subdivision, the term "average annual net earnings" means one-half of any net earnings of the business, or farm operation, before federal, state, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property being acquired, or during such other period as the public entity determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two-year or such other period. To be eligible for the payment authorized by this subdivision, the business or farm operation shall make available its state income tax records, and its financial statements and accounting records, for audit for confidential use to determine the payment authorized by this subdivision. In the case of an outdoor advertising display, the payment shall be limited to the amount necessary to physically move or replace such display.

(d) Whenever the acquisition of real property used for a business or farm operation causes the person conducting the business or farm operation to move from other real property, or to move his personal property from other real property, such person shall receive payments for moving and related expenses under

subdivision (a) or (b) and relocation advisory assistance under Section 7261 for moving from such other property.

(e) Whenever a public entity must pay the cost of moving a displaced person under paragraph 1 of subdivision (a), or subdivision (d) of this section:

(1) The costs of such move shall be exempt from regulation by the Public Utilities Commission.

(2) The public entity may solicit competitive bids from qualified bidders for performance of the work. Bids submitted in response to such solicitations shall be exempt from regulation by the Public Utilities Commission.

Supreme Court, U. S.
FILED
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INTRODUCTION

The "Response to Petition for Writ of Certiorari" (hereafter cited as "Resp.") filed by the Respondent presents the Court with the proverbial Exhibit A demonstrating the need for re-evaluation of the rule brought here for review. Surely, when briefing an issue of constitutional import before this Court, there ought to be some intellectually compelling requirement for an articulation of policy by those who

seek to defend this archaic injustice. Yet, one searches the Respondent's papers in vain for anything other than a singsong repetition of the intellectually [and in this case morally] bankrupt proposition that the law is the law. One surmises that the overwhelming weight of scholarly commentary is correct (see Petition for Certiorari, p. 12), and that Respondent simply has nothing to offer by way of rational analysis, and is perforce driven to repetition as its sole argument.

It seems to Petitioner that a repetition of the arbitrariness which forms an intrinsic part of the 19th Century rule of non-compensability of business goodwill, hardly commends itself as a justification of the excesses which 20th Century urban reality has visited upon the faultless victims of the urban redevelopment bulldozer. And that reality is the crux of Mr. Abrams' Petition for Certiorari, and of his plea for infusion of some fairness and rationality into today's process of of mass urban condemnations. That reality is also the very thing that Respondent ignores.

RESPONDENT'S OSTENSIBLE REFUTATION OF A SUPPOSED DOCTRINE OF "FULL INDEMNIFICATION" IS A STRAW MAN, AS MR. ABRAMS' PETITION IS DIRECTED TO COMPENSABILITY OF A SPECIFIC INTEREST DEFINED AND PROTECTED BY STATE STATUTORY LAW AS PROPERTY, AND NOT TO "ALL LOSSES INCIDENTALLY OR CONSEQUENTIALLY SUSTAINED."

The hoary technique of imputing to one's opponent an argument he never made, raises its head in Respondent's presentation (Resp. at 7). At no time did Mr. Abrams argue for "full indemnification" of "all losses". Throughout this appeal in the courts below, he carefully circumscribed his position as calling for the articulation of a rule that recognizes the moral imperative[1/] of providing some compensation in that class of cases where the owner through no fault of his own finds it impossible to relocate his business destroyed by condemnation. This is

1/ As the Court told us in United States v. Fuller (1975) 409 U.S. 488, 490, the technical concepts of property law must be tempered by "basic equitable principles of fairness" in structuring compensability rules.

by no means an unprecedented theory; it is used routinely in public utility condemnations, and it has received judicial endorsement in non-utility takings in several states: State v. Saugen (1969, Minn.) 169 N.W.2d 37; Redevelopment Authority etc. v. Lieberman (1975, Pa.) 336 A. 2d 249; City of Lansing v. Wery (1976, Mich.App.)____ N.W.2d ____ (opinion filed March 24, 1976); State Highway Commission v. L. & L. Concessions (1971, Mich.App.) 187 N.W.2d 465; Bowers v. Fulton County (1966, Ga.) 146 S.E.2d 884, 891.

In the context of Mr. Abrams' actual arguments and developing judicial recognition of the inadequacy of the 19th Century rule (which is exemplified by Mitchell v. United States, 267 U.S. 349[2/]) by numerous state courts [3/], Respondent distorts Mr. Abrams' position when it argues that Mr. Abrams seeks some sort of unbounded "Full Indemnification for All Losses" (Resp. at 7). Respondent's argument betrays a disregard of the issues presented for review, and the history of their presentation to the appellate tribunals in this case.

2/ Mitchell's rationale has not fared well in the market place of ideas; it has been roundly criticized by all legal commentators. See collection in State v. Saugen, supra, 169 N.W.2d at 44, and in State Highway Commn. v. L. & L. Concessions, supra, 187 N.W.2d at 468-469, fn. 11. Mitchell, moreover, is incompatible with this Court's more recent decision in Almota Farmers Elevator etc. v. United States (1973) 409 U.S. 470, where this Court expressly endorsed the theory of
(continued)

2/ (continued)
United States v. Certain Property etc. (1968, 2d Cir.) 388 F.2d 596, 598, definitively rejecting the theory that the condemnor need not pay for losses inflicted by the taking on some theory that such losses are an unitended incident of the taking. While Almota dealt with fixture valuation, its legal theory is simply incompatible with Mitchell.

3/ Some jurisdictions provide indirectly for relief to businessmen-condemnees by allowing evidence of the value of their goodwill as it influences the value of the tangible property taken. Housing Authority v. Lustig (1952, Conn.) 90 A.2d 169, 171; City of Trenton v. Lenzner (1954, N.J.) 109 A.2d 409. Others achieve a similar result by allowing the aggrieved condemnee to value his tangible property by capitalizing the income from his business. See State v. Olsen (1975, Mont.) 531 P.2d 1330.

RESPONDENT'S INCREDIBLE DISCUSSION OF SUPPOSED NON-TAXABILITY OF BUSINESS GOODWILL NOT ONLY FLIES IN THE FACE OF FAMILIAR TAX LAW, BUT ALSO UNDERSCORES THE ARBITRARY NATURE OF THE RULE THAT RESPONDENT PURPORTS TO DEFEND.

At first blush, one can scarcely believe one's eyes when reading Respondent's dissertation (Resp. at 5-6) on the supposed non-taxability of business goodwill. A closer reading, however, discloses Respondent's ploy to be a purely semantic one; i.e., goodwill - says Respondent - is not taxable "per se", as if the injection of this latin phrase somehow magically eradicated from consciousness that which every businessman who has dealt with the tax collector knows all too well.

The question is not how business goodwill is taxed, but whether it is taxed. And if goodwill is taxed (whether by the county tax assessor or some other bureaucrat) it perforce must first be recognized as [taxable] property, and it must be valued. What, then, makes goodwill so different and arcane in the context of eminent domain?

Can there be any question that a sale of a business results in taxation of any realized gains? Can there be any question that when a business is devised its value is subject to inheritance taxes? Can there be any question that a gift of a business is subject to gift tax? Indeed, on Respondent's own shaky premise (see Resp. at 6), when a "corporate franchise" is subjected to ad valorem taxation, how can its value be determined for tax purposes if not by consideration of the value of the corporation's goodwill?

Respondent tells the Court (Resp. at 4-5) that under California law an economic interest may be deemed "property" so that the government may tax the owner thereon, and yet not be deemed "property" when the shoe is on the other foot. That is indeed the assertion contained in the California Jonas case relied on by the Respondent (Resp. at 4-5). But is that a logically, morally or Constitutionally defensible rule?

Of course, other state tribunals have taken an entirely different position on this point. The Pennsylvania Supreme

Court, in its noted decision in Gottus v. Redevelopment Authority (1967, Pa.) 229 A. 2d 869, 872, put it thus: ". . . it appears anomalous to us to hold that the machinery of a commercial laundry is realty for tax assessment purposes and not such for eminent domain."

The question thus arises: which of these views comports with the federal constitutional principle? Is it compatible with the notions of due process and equal protection for a state to engage in such a now-you-see-it-now-you-don't game of definitional semantics?

It seems to Mr. Abrams that in light of this Court's language in Great Northern R. Co. v. Weeks (1936) 297 U.S. 135, 139 (see Petition for Certiorari herein, at p. 18, fn. 10), the Pennsylvania view is the correct one, while the California view amounts to an arbitrary denial of equal protection to the aggrieved businessman-condemnee.

There is something inherently and fundamentally shocking about the government taxing an interest with one hand because it is property for purposes of taxation,

while feeling free to destroy it with the other hand because it isn't property for purposes of compensation. 4/ That is a legal doctrine more at home in the pages of Kafka's fiction than within the boundaries of American constitutional law.

4/ Contrary to Respondent's misleading assertion (Resp. at 3), business goodwill is deemed property in California for all purposes (as the California Supreme Court expressly recognized in its opinion at bench - see Petition for Certiorari, at A-10, and the case authorities collected there). The inescapable and explicit provisions of California Civil Code §§ 654 and 655, as well as California Business and Professions Code § 14102 leave no doubt of that. Similarly, Respondent's description of the import of goodwill's taxability, (Resp. at 6, fn. 2 and accompanying text) is likewise misleading because it ignores the fact that California Constitution, Art. XIII, §1, defines "property" for purposes of taxation the same way as California Civil Code § 654 defines it generally.

THE CONSTRUCTION OF CALIFORNIA GOVERNMENT CODE § 7262 PRESENTED BY MR. ABRAMS IS THE CONSTRUCTION PLACED UPON IT BY THE CALIFORNIA SUPREME COURT. RESPONDENT IS CONFUSED.

Respondent charges Mr. Abrams (Resp. at 11-12) with "misinterpretation" of Cal. Govt. Code § 7262. The charge is puzzling in light of the California Supreme Court's words in the case at bench, which speak for themselves:

> "The California Relocation Assistance Act, at section 7262 of the Government Code, makes specific provision for the award of statutory compensation in cases of this nature. Subdivision (a) of that section provides: 'As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his: (1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property. (2) Actual direct losses of tangible personal

> property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property as determined by the public entity. (3) Actual and reasonable expenses in searching for a replacement business or farm."
> 15 Cal.3d at 834-835, 543 P.2d at 920; emphasis the court's.

Respondent is apparently confusing Mr. Abrams' argument directed to compensability of business goodwill (see Petition for Certiorari at 14-24), with Mr. Abrams' challenge to the constitutionality of Cal. Govt. Code § 7262 insofar as it imposes a limitation on recovery of the value of lost personal property based on such personal property's moving costs (see Petition for Certiorari at 25-27).

In his latter point, Mr. Abrams contends that limiting his statutory recovery for the $10,000 worth of prescription medicines to some trifling amount that

the moving of such medicines would cost, is arbitrary (see Petition for Certiorari at 26). That has nothing whatever to do with subdivision (c) of Cal. Govt. Code § 7262.

RESPONDENT'S CONSTRUCTION OF KIMBALL LAUNDRY AMOUNTS TO A SHOCKING DISTORTION OF THE FUNDAMENTAL PRINCIPLES ON WHICH REST BOTH LEGAL AND ETHICAL TENETS OF CONSTITUTIONAL LAW.

Respondent's interpretation of Kimball Laundry (Resp. at 9-11) can only be described as some sort of latter-day social Darwinism, whereby the old and sick can be preyed upon by powerful societal institutions with impunity. To dismiss the victims' economic and personal infirmities and vulnerabilities as somehow their problem that need not be reckoned with by those whose actions impact adversely on those victims, is a notion alien to American constitutional and general jurisprudence, and indeed to the basic ethical tenets of the Judeo-Christian traditions that underlie it.

From the familiar tort notion that the actor takes the plaintiff as he finds him, through the proliferating civil rights cases invoking punctilious constitutional protection on behalf of the poor and the disadvantaged - not because what was done to them was per se wrong, but because what was done impacted harshly upon their peculiar vulnerabilities - the law stands as a monument to the proposition that the powerful may not abuse the weak with impunity simply because they are weak.

Neither in Kimball Laundry, nor anywhere else, did this Court endorse the unconscionable suggestion that the aged and the infirm can be singled out as "fair game".

Moreover, Respondent's assertions concerning Mr. Abrams' supposed ability to start a new business elsewhere (Resp. at 10-11) betray a fundamental misunderstanding of elementary economic principles. When a business is destroyed and the former owner starts a new business elsewhere, he obviously does not recapture any of

his lost value.[5] Respondent's argument is is thus a complete non sequitur.

More importantly, Respondent's argument distorts the ample and undisputed record at bench: this condemnation eliminated the neighborhood from which Mr. Abrams drew his clientele, and scattered that clientele to the four winds. The trial court made a finding that Mr. Abrams' business was taken and destroyed. Respondent's speculations as to what Mr. Abrams might have done if the neighborhood had not been condemned, of if he had been younger, are thus sheer fiction, and an impermissible excursion outside the record.

5/ Just as a tort victim whose automobile is destroyed and who buys a replacement, does not thereby undo the damage he suffered when his original automobile was destroyed.

CONCLUSION

In 1954, when this Court decided Berman v. Parker, 348 U.S. 26, a moral I.O.U. was issued to the citizens in the path of urban redevelopment bulldozers. In Berman, this Court endorsed a process of mass condemnations serving the pecuniary benefit of private entrepreneurs chosen as the instrument of Congressional redevelopment policy (348 U.S. at 33-34), on the express premise that the Fifth Amendment exacts just compensation as a price of the taking (348 U.S. at 36).

Yet, the implicit promise of Berman remains unfulfilled. Berman's quantum jump, expanding so vastly the power to take and to uproot, ought to be balanced by at least some attention to the development of parameters of just compensation as an equally modern concept, co-extensive

with and balancing that expanded power.[6/] Such balancing is long overdue.

It simply isn't fair - in the elemental, constitutional meaning of that word - to vastly expand the scope and incidence of condemnations, to encourage the bulldozing of American cities on an undreamed-of scale in the name of 20th Century progress, and yet restrain the correlative growth of compensation law, and to keep compensation principles shackled to notions rooted in a bygone 19th Century agrarian society, without any regard to the peculiarly 20th Century problems of urban condemnees subject to today's mass takings.

The same recognition of changing social conditions and values, and the same regard for pragmatic experience, extended to some

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6/ And, of course, the function of formulating rules of just compensation is, and always has been, a judicial one: Monongahela Navigation Co. v. United States (1892) 148 U.S. 312, 327; Seaboard Air Line Ry. v. United States (1923) 261 U.S. 299, 304; United States v. New River Collieries (1923) 262 U.S. 341, 343; Baltimore & Ohio R.R. v. United States (1935) 298 U.S. 364, 365.

of the most unworthy members of society[7/] deserves extension to the plight of innocent citizens whose only "sin" is that through no fault of their own, their hard-earned property found itself in the path of a redevelopment project.

The undisputed facts at bench serve as a grim reminder of what is being done to American citizens in the name of the law laid down by this Court in Berman. Those citizens need and they deserve a judicial recognition of their plight. They deserve at least to have their cause judged by the constitutional standards developed in the real, post-Berman world.

7/ It is ironic that in Furman v. Georgia (1972) 408 U.S. 238, every member of the Court - whatever his position - recognized that that case was being decided on a historical re-evaluation of the concept of cruel and unusual punishment, in light of changed social conditions and values, as well as empirical experience with imposition of capital punishment. Surely, if those guilty of heinous crimes are entitled to such constitutional re-evaluation, should not the same be extended to good citizens as well?

Mr. Abrams prays that his Petition be granted.

Respectfully submitted,

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SUPPLEMENT TO PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1642

ARTHUR J. ABRAMS

Petitioner

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES

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Petitioner respectfully requests leave to file this Supplement for the purpose of calling to the Court's attention certain additional authorities that have become available since the filing of his most recent brief.

First. Particularly noteworthy is the decision of the Alaska Supreme Court in State v. Hammer (1976) 550 P.2d 820,

which analyzes and rejects the outmoded rationale of older cases denying compensation for business losses. Particularly noteworthy are:

(a) Hammer's rejection and sharp criticism of Mitchell v. United States (1925) 267 U.S. 349, as representative of an "older line of reasoning" (550 P.2d at 823), and an approach that "has several flaws" (550 P.2d at 824),

(b) Hammer's conclusion that today's reality calls for a different approach: "This court would poorly serve the law if it were to . . . blind itself to the realities of condemnation." (550 P.2d at 824),

(c) Hammer's impressive marshalling of the numerous scholarly commentaries denouncing the rule of non-compensability of business losses as archaic and unjust (550 P.2d at 825, fn. 16), and

(d) Hammer's persuasive conclusion (particularly pertinent in the context of Mr. Abrams' first question

presented for review herein, Petition for Certiorari, p. 4), that compensation is required because the law of Alaska - like the law of California - deems business to be property (550 P.2d at 826).

Second. Petitioner's Reply to Response to Petition for Writ of Certiorari cited the case of City of Lansing v. Wery at p. 4. That case has since appeared in the advance sheets and may be found at 242 N.W.2d 51.

Finally. An additional legal commentary has appeared, predictably sharply critical of the non-compensability rule. See Masterman and Tully, Compensation for Business Loss - Eminent Domain Proceedings, 20 Boston Bar Jour. 3 (1976).

Respectfully submitted,

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